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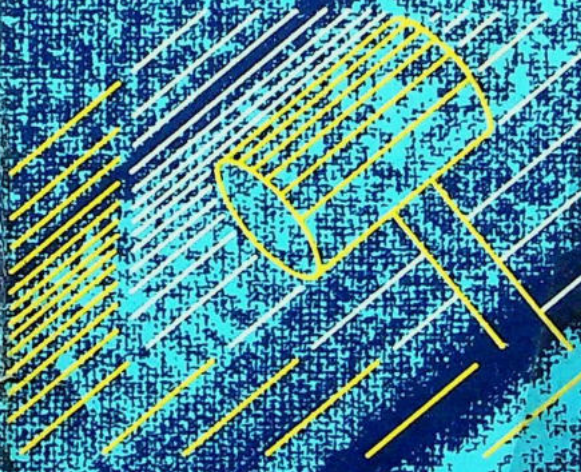
The Constitution of JAMMU & KASHMIR

Its Development & Comments

Justice A.S. Anand
JUDGE, SUPREME COURT OF INDIA



Foreword by
Justice M.N. Venkatachaliah
Chief Justice of India

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ABOUT THE BOOK

In this second edition of the book, an attempt has been made to study the manner in which the State of Jammu & Kashmir was created, the effect of this creation and the influence of other factors on the development of its Constitution. The promulgation of the Jammu and Kashmir Constitution Act, 1939, its salient features and the factors which led to the enactment of the Act have also been considered. The accession of the State of Jammu and Kashmir to India which has been a matter of some political controversy has been dealt with in details. Since, significant developments occurred in Jammu and Kashmir, subsequent to its accession to India which made its constitutional position different from that of bther Indian States, and other factors have been discussed. The full constitutional position of the State of Jammu and Kashmir cannot be understood by a reference to the Constitution of Jammu and Kashmir alone, its recourse has to be made to the Constitution of India so far as it applies to the State. The ambit and scope of Article 370 of the Constitution of India has been examined. Various Presidential Orders and Ordinances applying different provisions of the Constitution of India to the State have been noticed and commented upon. Comments have also been made on various provisions of the Constitution of Jammu and Kashmir, 1957, as amended from time to time, and it has been appended with various amendments. This second edition also contains the list of important Central Acts which have been applied to the State from time to time. The comments on the constitutional provisions have been made by referring the latest case law on the subject.

Why the Constitution of India was not made fully applicable to the State of Jammu and Kashmir like the rest of the States in India? Why the State was allowed to have a Constitution of its own? What were the factors which induced the State to have its own Constitution and to secure a special status in the Indian Union? Has the peculiarity in Kashmir led to any great hardship? These are some of the questions which have been answered in this book.

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OPINIONS
ON THE SECOND REVISED EDITION

*"Dr. Justice Anand's treatise on "**The Development of the Constitution of Jammu & Kashmir**" takes us through a journey of the most significant area of Indian nation building and the delicate and sensitive issues which mark the evolution of the process of integration of State of Jammu & Kashmir into the Indian constitutional mainstream. It is a scholarly-work by an erudite jurist...This Book which is a significant contribution to this branch of law, will be of particular value to the students of Indian constitutionalism, particularly at times when a deeper study of the fundamental constitutional issues have assumed great contemporary relevance. This Book compels thought and compels debate. Did not Sir Oliver Franks say: "The amount of time that people are willing to waste in hearing each other talk is a very important constituent of our political life."*

Justice M.N. Venkatachaliah
Chief Justice of India

"The book, according to me, is a complete support/answer to the various questions being raised for and against the legality of the Instrument of Accession. This is the only work on the subject. There is lot of misunderstanding rather ignorance all around regarding the historical events which led to the framing and retention of a separate Constitution by the State of Jammu and Kashmir despite its integration by way of accession to India. I am of the view that apart from Judges, lawyers and students of Constitutional Law, this book should be made available and read widely in India and abroad to dispel the doubts which often arise out of ignorance regarding the historical background and the constitutional development in the State of Jammu and Kashmir."

Justice Kuldip Singh
Judge, Supreme Court of India

"Most readable and most informative, the only authenticated Commentary... I agree entirely with (the) thesis about the legality of accession... it is well put."

F. S. Nariman
Senior Advocate, Supreme Court of India

*"Dr. A.S. Anand, as a distinguished jurist has in his book "**The Constitution of Jammu and Kashimr**" traced the growth of the constitutional development in the State and also offered valuable comments on various aspects of the Constitution framed by the Constituent Assembly of the State.... He is very clear and emphatic in regard to the finality of the accession, which, according to him can not be re-opened. He argues that the accession of Kashmir to India was an issue arising out of partition of India and the negotiations proceeding it. It is not within the competence of the Security Council to re-open this issue at the instance of India or Pakistan. It was a constitutional act of a sovereign British Parliament, which gave the power to sign the Instrument of Accession to the Ruler in his own discretion. If the accession of Kashmir could be re-opened, it could imply the re-opening of the whole question of independence of India and Pakistan. The learned author holds the accession of the state analogous to the annexation of the Texas by the United States of America.*

The treatise of Dr. Anand is well-documented and beautifully brought out. It is an all-time publication fit to find a place on the book shelves of all those interested in the Kashmir imbroglio."

The Excelsior
20th November, 1994

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The Constitution of Jammu & Kashmir

Its Development & Comments

JUSTICE ADARSH SEIN ANAND
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Barrister-at-law,
Judge, Supreme Court of India

Foreword by
JUSTICE M.N. VENKATACHALIAH
Chief Justice of India

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PREFACE TO THE SECOND EDITION

After the publication of the first edition in 1980, various provisions of the Constitution of India and a number of Central Acts have been extended to and made applicable to the State of Jammu & Kashmir. The Constitution of Jammu & Kashmir, 1957, itself has been amended from time to time. In this second edition, some of the important Central Acts, since extended to the State of Jammu & Kashmir, have been consolidated and added as an appendix. The Constitution of Jammu & Kashmir, 1957, as amended from time to time, has also been included as an appendix for facility of reference. Since, the publication of the first edition, some of the provisions of the Constitution of India as applicable to the State of Jammu & Kashmir, as well as some of the provisions of the Constitution of Jammu & Kashmir have come up for authoritative pronouncements by the Supreme Court as well as the High Court of Jammu & Kashmir. Those pronouncements have been included in this revised Second edition to make the book more comprehensive.

I owe a debt of gratitude to Shri M.N. Venkatachaliah, Chief Justice of India, for kindly sparing some of his valuable time from his extremely busy schedule and writing a FOREWORD for this revised edition. The scholarly foreword which demonstrates his deep knowledge in the field of Constitutional Law and admirably condenses the importance of Constitutionalism in the evolution of political institutions and development of a nation, enhances the value and utility of the book. I am deeply touched by the generous sentiments expressed by him.

I am thankful to Shri Imtiyaz Hussain, KCS (Judicial) at present the Secretary to the Chief Justice of Jammu & Kashmir High Court, for his useful suggestions, comments and assistance in collecting valuable materials relating to the amendments of the Constitution of Jammu & Kashmir and the application of various central laws to the State of Jammu & Kashmir.

I thank the publishers M/s. Universal Book Traders, New Delhi for bringing out the revised second edition in a remarkably short time.

New Delhi
May, 1994

ADARSH SEIN ANAND

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PREFACE TO THE FIRST EDITION

The various stages of development of the Constitution of India have been widely discussed. Although the stages of development of the Constitution of Jammu and Kashmir, 1957, are of no less importance, it seems that, due to an international controversy concerning the State, the internal aspect of its constitutional history has remained under eclipse.

The purpose of the present study is to trace the growth of the Constitution of Jammu and Kashmir, 1957, paying particular attention to factors which induced the State to have a constitution different from the other states in India, to draft its own constitution and to secure a special status in the Indian Union.

The growth of the Constitution of Jammu and Kashmir is synonymous with the march of the State from absolute autocracy to parliamentary democracy. The Constitution of Jammu and Kashmir reflects the hopes and aspirations of the people in the State.

The monarchical constitution of 1939 fell short of meeting the demands of the political parties in Kashmir. This constitution provided for an authoritarian form of administration and its chief characteristic was the unchallengeable authority of the Ruler.

With the attainment of independence by India and the accession of the State to India, constitutional reforms in the State were expedited. As a consequence of its accession, the Constitution of India was applied to the State not in its entirety but only to the extent to which it was agreed. The State was given the right to frame its own constitution. At a time when all other States in India had accepted the Constitution of India as a constitution for the states also, this privilege accorded to Kashmir was very closely watched. The constitution of the state was adopted in 1957.

The Constitution of Jammu and Kashmir is not in one document, it is contained in two different documents—the Constitution of India in relation to Kashmir and the Constitution of Jammu and Kashmir, 1957. Has this peculiarity in Kashmir

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led to any great hardships? Is there a possibility of a conflict between the State law and the Union Law? Is the Constitution of Jammu and Kashmir, 1957, a perfect document? In this thesis an attempt is made to answer these questions and to present the juridical interpretation of the Constitution of Jammu and Kashmir. To the best of the author's knowledge, no work in this field has so far been published and it is hoped that this work will fill up a long awaited gap.

The original manuscript of this thesis was presented to the Faculty of Laws of the University of London in April 1963. It was accepted by the London University for the award of the Degree of Doctor of Philosophy in the field of the Constitutional Laws of the Commonwealth. Since, after 1963, some developments of great significance took place in the State of Jammu and Kashmir, I have made slight additions and alterations to the original manuscript to bring the Constitutional development up to date, otherwise the thesis remains as presented to the University of London.

I am greatly indebted to Mr. D.C. Holland, M.A., Reader in English Law at the University College, London, under whose kind and patient supervision this work was carried out.

It is with utmost sincerity that I acknowledge the able guidance, helpful criticism, advice and encouragement I received from Professor Alan Gledhill, M.A.,LL.D.,I.C.S. (Retd.), former judge of the High Court of Rangoon, Professor Emeritus, Oriental Laws, University of London. I am sensible to the numerous demands I made on his time and offer my sincere thanks to him.

I am grateful to the staff of the various libraries where I consulted most of the material used in this work and in particular I am thankful to Professor K.E. Robinson, Director of the Institute of Commonwealth Studies, London for his unfailing help. The assistance given by the staff of the High Commission for India in London and in particular by the Librarian Miss W.K. Thorne and her assistant Miss Maureen Travis is highly appreciated. I am greatly indebted to the staff of the British Museum Library, London for their help and assistance.

I owe a deep debt of gratitude to my wife, Mala, who read

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the original manuscript and without whose devoted attention it would not have been possible to bring this work up to date.

High Court of Jammu & Kashmir,
Jammu.
September 1980

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New Delhi-110011

FOREWORD

Prof. Dicey commented that legal treatises on constitutional law were "a kind of maze in which the wanderer is perplexed by unreality". Prof. Dicey also referred to Blackstone's statements that the "Constitution of England concentrated all executive power in the hands of the King" and said that it was an impressive statement; but added that "It has but one fault; the statements it contains are the direct opposite of the truth."

Marshall & Moodie in their "Some Problems of the Constitution" referred to "the unhappy plight of any compiler of an encyclopedia of the world's constitutions. A Frenchman in this position might simply omit the United Kingdom altogether on the ground that the British Constitution does not exist." Costin and Watson in their "The Law and Working of the Constitution: Documents", [1660-1914 (1952), vol. 1, p.vii] say that 'the British Constitution is not written down in books but is flexible in the sense of being found in the minds and practice of each generation.'

A study of the evolution of the political-institutions and the constitutional laws and conventions of the Commonwealth is, for the political scientist, as fascinating as it is rewarding. The Indian Constitution was not written on a 'tabula-rasa'. The constitutional experiments in India ----- of which the integration of the Indian States into the mainstream of the Indian Constitutional system was a noble effort ---- are a saga of statesmanship, faith and hope, and had their own sublime moments. They also passed through times of anguish, distrust, travails and turmoil. But the overall response of the Indian States to the democratic aspirations of the people and the urges of Indian nationalism was one of great satisfaction

The mere existence of a Constitution, by itself, does not ensure constitutionalism. What are important are the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation. I may here recall the pregnant words of Prof. De Smith in his thoughtful 'Foreword' to Nwabueze's "Constitutionalism in the Emergent States". The Professor said :

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"...we have seen it enacted so many times in so many countries. In a large majority of newly independent states, even the most modest expectations of liberal constitutionalists have gone unfulfilled. Perhaps such expectations ought not to have been entertained. Colonial authoritarianism, belatedly modified in its decline, had shown how a country could be governed even without popular backing. The nationalists who took over political power found too many seductive temptations to cling to office regardless of constitutional restraints or respect for minority interests. And the frustrations engendered by the prospect of indefinite exclusion from the privileges of office were usually too severe for a loyal opposition to develop. In such a political climate it was unrealistic to be astonished when political activity failed to exhibit a decorous regard for the rules of the constitutional game. Nor was a federal constitutional structure, which presupposed a willingness to accept restraints on the exercise of power at both the central and regional levels, at all likely to flourish. When, moreover, the principal divisive factors in the state are communal-religious, racial, tribal or linguistic - the prospects for constitutionalism are never bright, even in a developed country, as the recent history of Northern Ireland has underlined."

Dr. Justice Anand's treatise on **"The Development of the Constitution of Jammu & Kashmir"** takes us through a journey of the most significant area of Indian nation building and the delicate and sensitive issues which mark the evolution of the process of integration of State of Jammu & Kashmir into the Indian constitutional mainstream. It is a scholarly-work by an erudite jurist. Dr. Justice Anand is a rare combination of a Judge, constitutional lawyer, scholar and, more than all, a great human being whose personal charm and gracious relationship is matched and, perhaps, surpassed only by his great scholarship and penchant for justice. This Book which is a significant contribution to this branch of law, will be of particular value to the students of Indian constitutionalism, particularly at times when a deeper study of the fundamental constitutional issues have assumed great contemporary relevance. This Book compels thought and compels debate. Did not Sir Oliver Franks say: "The amount of time that people are willing to waste in hearing each other talk is a very important constituent of our political life".

New Delhi.
May 12, 1994.

M.N. Venkatachaliah

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LIST OF ABBREVIATIONS

Law Reports

America

U.S.	United States (Supreme Court)

India

A.D.	Appex Decisions
A.I.R.	All India Reporter
All.	Allahabad
A.L.J.	Allahabad Law Journal
Bom.	Bombay
Cal.	Calcutta
C.L.J.	Calcutta Law Journal
C.W.N.	Calcutta Weekly Notes
F.C.	Federal Court
I.A.	Indian Appeals
I.L.R.	Indian Law Reports
J & K	Jammu and Kashmir
J.K.L.R.	Jammu Kashmir Law Reports
K.L.J.	Kashmir Law Journal
Law & Jus	Law & Justice (Journal of the United Lawyers Association)
M.B.	Madhya Bharat
Mad.	Madras
Nag.	Nagpur
Pat	Patna
Pb.	Punjab
P.C.	Privy Council
Raj.	Rajasthan
S.C.	Supreme Court
S.C.A.	Supreme Court Appeals
S.C.J.	Supreme Court Journal
S.C.R.	Supreme Court Reports
S.L.J.	Srinagar Law Journal
S.L.R.	Service Law Reporter
T.C.	Travancore-Cochin
U.P.	Uttar Pradesh
V.P.	Vindhya Pradesh

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United Kingdom

A.C.	Appeal Cases
All E.R.	All England Reports
Ch. D.	Chancery Division
Ex.	Exchequer
K.B.D.	King's Bench Division
Moo. P.C.	Moore's Privy Council Cases
Moo. I.A.	Moore's Indian Appeals
Q.B.D.	Queen's Bench Division

United Nations

All references to the United Nations documents in this thesis are designated by the letter system by the United Nations itself. Thus:

S/	Security Council Documents
S/P.V.	Security Council Verbatim Reports
U.N.C.I.P.	United Nations Commission for India and Pakistan
U.N.O.	United Nations Organisation

Miscellaneous

Art.	Article
C.P.C.	Civil Procedure Code
Cr. P.C.	Criminal Procedure Code
I.P.C.	Indian Penal Code
Sec.	Section

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1

Introduction

The problem of Kashmir has been discussed in great detail before various international forums but in these discussions there has been a remarkable dearth of reference either to the Constitution of Jammu and Kashmir or to its constitutional relations with India. To the best of the author's knowledge no investigation has been made into this aspect and there is no book or article which directly deals with this subject.

This thesis is a study of Kashmir's political history and constitutional law, analysing the factors which led to the enactment of the Constitution of Jammu and Kashmir. "Politics nourishes the legal cells of the body of government. But there is no hard and fast dividing line between politics and constitutional law".[1]

The growth of a constitution varies with the political growth of the nation which the constitution seeks to govern. Whereas the life of the people is influenced by the Constitution, the latter in turn is affected by their national and political outlook. So, in studying the growth of a constitution, one must take into account the political growth of the nation.

The Indian States (of which the State of Jammu and Kashmir was one) were those areas in the Indian Sub-Continent

[1] Anderson, H.R., 'The Constitutional Framework', in Davies, S.R. (ed.), *The Government of the Australian States*, Melbourne, 1960, p. 1.

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which were for internal purposes outside the administrative, legislative and judicial sphere of the (British) Government of India. Each had a hereditary ruler, who, subject to the paramountcy of the British Crown, exercised, with some exceptions, unlimited power over his subjects. These States covered more than half the area of the Indian Sub-Continent and were referred to as 'Indian India'. The other 'India' was British India, comprising the provinces and certain other areas.

The two Indias disappeared with the Indian Independence Act, 1947,[2] and by subsequent integration of the Princely States with the Dominions of India and Pakistan.

When the partition of India came,[3] Kashmir was in a state of political unrest; the public demand for a Constitution was the result of a number of grievances. The autocracy of the ruler, the denial of fundamental rights, his anti-Muslim policies and the inefficiency of his government kept the public in a state of discontent. As the partition of British India made two independent sovereign states, it was hoped that the lapse of Paramountcy and the independence of the Sub-Continent would at least put Kashmir on the road to self-government.

As soon as the States were released from their allegiance to the British Crown under the Indian Independence Act, 1947, their rulers became repositories of all powers. Sovereignty reverted to them and they were given discretionary power to accede to either of the two Dominions.

The ruler of Jammu and Kashmir State, the late Maharaja Sir Hari Singh, great-grandson of the founder of the State, acceded to the Dominion of India on 26th October, 1947 in the manner prescribed by the Government of India Act, 1935. This accession has been the subject matter of controversy between India and Pakistan since the emergence of the two nations. The present writer has intentionally avoided the international controversy over the State. But since the accession of the State to the Indian Union is a very important step in the development of the Constitution of Jammu and

2 10 and 11 Geo. 6, Ch. 30.
3 August 15, 1947.

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Kashmir, it has been studied and its legality discussed in the thesis.

Subsequent to their accession, the Indian States, other than Kashmir, were integrated with India and they accepted the Constitution of India as a Constitution for the States. Kashmir, however, was not integrated but retained an anomalous autonomy and as an Indian commentator observed,[4] "...Kashmir is neither (an) A, B, or C.....class State; it is a triple A" (The A States were former British provinces; the B states were the former Princely States and the C states were minor territories to which the federal principle was not applied. This distinction has now been done away with by the States Reorganisation Act, 1957).

Various developments occurred in Jammu and Kashmir State subsequent to its accession to India and made its constitutional position materially different from that of the other Indian States. The State forms a part of the territory of the Indian Union[5] but its constitution does not form a part of the Constitution of India. It has its own constitution enacted by its own Constituent Assembly and, as it was framed by the representatives of its people, it was tested at every stage to ensure its suitability to the people concerned. The State is an autonomous unit in the Indian Union and thus unique, but because of its accession to India and the surrender of some powers consequent upon accession, some provisions of the Indian Constitution have been made applicable to the State in consultation with the State Government. The full constitutional position of Kashmir cannot be understood by a reference to the Constitution of Jammu and Kashmir alone; recourse has to be made to the Constitution of India, in so far as it applies to the State.

To study the development of a constitution in a particular country, it is necessary to survey the early social and political institutions in that land. Only after this can the Constitution be properly analysed. To understand the development of the Constitution of Jammu and Kashmir, one has to go far back into history. This thesis begins with the days before the State

4 *Amrit Bazar Patrika*, Calcutta, 29-9-1952.
5 *Constitution of India*, Article I.

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was created. It goes on to consider the manner in which it was created, the effect of this creation and the influence of these factors on the development of its Constitution (Chapter 2). The political awakening of the Kashmiris made a considerable contribution to the promulgation, by the Ruler, of the Jammu and Kashmir Constitution Act, 1939.[6] In Chapter 3, both the factors which led to the enactment of the Act and the Act itself have been studied. Chapter 4 deals with the accession of the State to India and in Chapter 5 the consequences of the accession have been examined. In Chapter 6 the Constitution of India in relation to Jammu and Kashmir has been discussed. The Constituent Assembly of Jammu and Kashmir State completed the task of framing the Constitution of the State in 1957. In Chapters 7 and 8, the provisions of the Constitution have been discussed My conclusions are dealt with in Chapter 9.

Wherever necessary the distinction which exists between Kashmir and the other Indian States under the Constitution of India has been underlined. In short, in these pages apart from the constitutional and political history of the State of Jammu and Kashmir, three constitutions have been discussed, viz., the Jammu and Kashmir Constitution Act, 1939; The Constitution of India in relation to Kashmir and The Constitution of Jammu and Kashmir, 1957.

The subject of the thesis is so wide in scope that the selection of matters which warrant inclusion is difficult. The author has made an attempt to cover exhaustively the relevant matters, relying on judicial pronouncements, parliamentary papers, published and unpublished reports and various books and commentaries. This survey is confined to the Indian State of Jammu and Kashmir for no published or unpublished material on the constitutional development of *Azad Kashmir* (i.e. the portion of Kashmir under the illegal occupation of Pakistan) is obtainable in Britain and from India. The discussion of the Constitution of India in these pages is only confined to the provisions as applicable to the State of Jammu and Kashmir or

6. Act XIV of 1996 (A.D. 1939).

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to draw the distinction between the provisions as applicable to this State and the provisions as applicable to the rest of the States in the country.

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2

Historical Background

(1) PAST HISTORY

The State of Jammu and Kashmir lies between 32° and 37°N and 73° and 80°E. It is almost entirely a mountainous region. Geographically, the State falls into four natural regions. In the south lies Jammu, the winter capital of the State; in the centre is the happy valley of Kashmir which contains the summer capital, Srinagar; to the north is Gilgit; and between the Kashmir valley and Tibet is the province of Ladakh. The State has a population of over four million people[1] and it covers an area of 84,471 sq. miles. It has 39 towns and 8,903 villages.[2] Situated at the apex of the Indo Pakistan sub continent, Kashmir[3] is of great strategic importance owing to the fact, that to its east lies Tibet; to the north-east, Sinkiang, a province of China; to the north-west, Afghanistan and a few miles from Afghanistan lies Russian Turkestan. This actual and potential importance of Kashmir has caused the rulers of adjoining countries to cast covetous eyes on it.[4]

1 Census figures from *Times of India*, Delhi, July 29, 1952.
2 *Census report*, 1941.
3 Kashmir is the universally recognised abbreviation for the State of Jammu and Kashmir although actually it refers only to one province.
4 See Map, *Appendix I.*

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In 1846, the State of Jammu and Kashmir, as it exists today, was created by the British Government. For the purposes of this work it is necessary to study the history of Kashmir, the mode of its creation, the history of its rulers and their efforts to get established in and maintain their hold on the people and the territory.

Till 1846, Jammu, Kashmir and Ladakh were separate and distinct areas under different rulers. We shall briefly study the history of these provinces till their consolidation in 1846.

(a) Kashmir

"Throughout history Kashmir has been on appanage (sic) of empires in India. Only when there was no strong rule in the North has she broken away and lived her own life beyond her ramparts of mountains."[5] Kalhana, the celebrated poet-historian of Kashmir suggests that the political history of Kashmir originated with King Gonanda, but most of the recent historians begin their studies with Asoka, who lived in the third century B.C. A constant flow of invasions and dynastic eruptions which brought to power ruling families, was the central feature of the succeeding two thousand years.[6] Mohamed Shah (1487-1489 A.D.) was succeeded by his son Fateh Shah. From the Shah family the rulership passed on to the Chaks, who were Shia's and came from the country of the Dards. Gazi Khan became the first Chak Ruler in 1554. The next change of importance was the invasion of Kashmir by the Emperor Akbar. This great potentate conquered the valley in 1588 by defeating the Chaks and made Srinagar his summer resort. Moghul rule lasted in Kashmir something more than a century and a half. Kashmiris (or *Koshurs* as they are called) got new rulers about the years 1752-54, when Ahmed Shah Abdali conquered Kashmir. From that time for about seventy years Kashmir was ruled by Afghans or Pathans, through Governors appointed by the King of Kabul.

In 1819, Maharaja Ranjit Singh of the Punjab invaded

5 Barton, Sir William, *The Princes of India*, London, 1934, p. 121.
6 Brecher, Michael, *Struggle for Kashmir*, Canada, 1956, p. 5.

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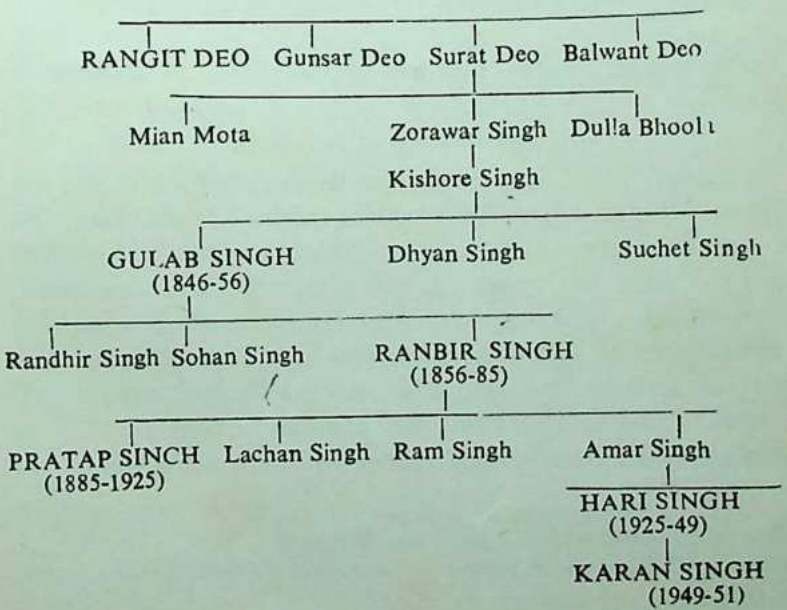
Kashmir and was successful in wresting Kashmir from the Pathan rulers. For nearly twenty-five years Kashmir was ruled by Governors appointed by the Sikh Darbar at Lahore.

(b) Jammu

In the middle of the Eighteenth century, Jammu was ruled by a Dogra[7] Chief of the Rajput descent named Ranjit Deo. He died in 1780 A.D. and there ensued a dispute for the succession, the three grand nephews of Ranjit Deo struggling to rule Jammu.[8] They were the sons of Kishore Singh, who was the son of Zorawar Singh, a nephew of Ranjit Deo. The dispute between Kishore Singh's sons gave the Sikh Darbar of Lahore an opportunity to turn Jammu into a dependency. In 1808 Jammu was annexed to the Sikh territory and the three sons of Kishore Singh took services under Raja Ranjit Singh. Pleased with the services of three brothers, Raja Ranjit

7 *Dogras* are the people living in the Jammu province.

8 Geneaological tree of the Dogra Rulers:



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Singh in 1820 conferred the principality of Jammu on Gulab Singh, the eldest of the three brothers, with the hereditary title of Raja; Bhimber and Chibal including Poonch were given to Dhyan Singh and Ram Nagar to Suchet Singh. Both Dhyan Singh and Suchet Singh were subsequently killed and their jagirs also fell in the hands of Gulab Singh. Thus, the whole province of Jammu came under a single ruler, for the first time in the history of Jammu.

(c) Ladakh

Ladakh had been a tributary of Tibet for centuries. About the middle of the seventeenth century, in 1687, the Moghuls with the help of the rulers of Western Tibet, defeated the Mongols and for nearly a century it remained with the Moghuls.

In 1834 A.D. Gulab Singh, the ruler of Jammu, sent Zorawar Singh with a force of about 800 to conquer Ladakh. The King of Ladakh submitted, agreeing to pay a war indemnity of Rs. 50,000/-, so Gulab Singh became Raja of Ladakh also. He conquered Lhasa in 1842 and at the same time annexed Skardu and Baltistan. Thus, "whether it was a policy or it was accident, by 1840, Gulab Singh had encircled Kashmir".[9]

(d) Events leading to the creation of the State of Jammu & Kashmir

In November 1845, war broke out between the Sikhs and the British at Sobraon. The Sikh nobles asked Gulab Singh to help and lead them. But Gulab Singh was not interested in helping the Sikhs to whom his allegiance formerly belonged. "Golab (Singh) (sic) urged the army not to attempt attacking the British until he joined them and this he evaded doing, on one pretext or another, knowing fully well that in due time the British would attack and capture the position at Sobraon".[10] By remaining aloof, Gulab Singh wanted to "earn the gratitude of

9 *Imperial Gazetteer of India*, 1908, Vol. XV, p. 95.
10 Edwards, William, *Reminiscences of a Bengal civilian*, London, 1866, p. 104.

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the British diplomats"[11] and in this he was successful. He was all the time thinking of carving out a State for himself and so, when he was asked to become the Prime Minister of the Punjab, after the Sikhs were vanquished, he was delighted. Immediately after accepting the office, Gulab Singh put himself in touch with the British authorities. "Raja Golab Singh, on being installed as Minister, put himself in communication with us, proffering every assistance in his power for the furtherance of any ends in regard to the State of Lahore which we might have in view", wrote the Governor-General of India to the Secret Committee.[12] As a result of the negotiations between the defeated Sikhs and the British, the British Government demanded a war indemnity of Rupees one and a half-crore. The British Government knew that the Sikh Darbar was not in a position to pay so much and was not disposed to enforce payment; the object was to weaken the Sikh Darbar, which was a constant menace. The plan was that "if the Sikh Durbar offer Cashmeer instead of the payment of $1\frac{1}{2}$ million, to accept the offer, and transfer Cashmeer to Gulab Singh in payment of the compensation necessary".[13] Lord Hardinge wrote to Lord Ripon, "a Rajpoot State independent of the Sikhs on the right flank of our Beas frontier would strengthen us and weaken the Sikhs—and this I consider most desirable".[14] True to the British expectations, the Sikh Darbar offered to cede the territories between the River Beas and Sutlej in lieu of one crore of rupees and the British Government accepted this offer readily. On March 9, 1846, was concluded the treaty of Lahore between the British and Raja Dhuleep Singh of Lahore. It was provided in this treaty that Maharaja Dhuleep Singh of Lahore cedes to "the Honourable Company, in perpetual sovereignty, all his forts, territories, and rights in the Doab and country, hill or plain, situated between river Beas and Sutlej". Among other things it was also provided in this treaty

11 Bazaz, P.N., *The history of struggle for freedom in Kashmir*, New Delhi, 1954, p. 122.

12 Letter from the Governor-General of India to the Secret Committee, Dated 19 February, 1846. Ripon papers; British Museum Add. MSS 40875 (Unpublished).

13 Hardinge to Ripon, 19 February, 1846, Ripon papers; Add. MSS 40875.

14 Hardinge to Ripon, 19 February, 1846, Ripon papers; Add. MSS 40875.

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that "in consideration of the services rendered by Raja Golab Singh of Jammu, to the Lahore State towards procuring the restoration of the relations of amity between the Lahore and British Government, the Maharaja (Dhuleep Singh) hereby agrees to recognise the independent sovereignty of Raja Golab Singh in such territories and districts in the hills as may be made over to the said Raja Golab Singh by separate agreement between himself and the British Government...".

Seven days after the conclusion of this treaty, another treaty was concluded between Raja Gulab Singh and the British Government on March 16, 1846 at Amritsar.[15] By this Treaty of Amritsar—notoriously referred to in the State of Jammu and Kashmir as the 'Sale Deed of Kashmir'—the British Government made over to Raja Gulab Singh the State of Jammu and Kashmir. By Article I of the Treaty, Kashmir was made over "for ever and in independent possession, to Maharaja Golab Singh and the heirs male of his body". Article III of the Treaty read:

> "In consideration of the transfer made to him and his heirs by the provisions of the foregoing Articles, Maharaja Golab Singh will pay to the British Government the sum of Rupees (Nanukshahee) fifty lakhs to be paid on ratification of this treaty and twenty-five lakhs on or before the first October of the current year, A.D. 1846."

And so, for a total sum of Rupees seventy-five lakhs was sold to Maharaj Gulab Singh, an area of 84,471 sq. miles and 2½ million people. This transaction between the British Government and Gulab Singh has been a subject of great controversy. The British Government accepted a payment of Rupees seventy-five lakhs for transferring the State to Raja Gulab Singh, yet Sardar Panikkar, who has written a biography of Maharaja Gulab Singh says, "in discussing this question of the transfer of Kashmir, it is....important to remember (that) there was *no sale* of

15 See Appendix II.

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Kashmir at all".[16] He bases this contention on the ground that even before this treaty was signed it had been agreed between the British Government and the Lahore Darbar that area between River Beas and Sutlej was to be transferred to Raja Gulab Singh. This contention is of course, undisputable, but the treaty between Lahore and the British left it to the British Government to enter into separate engagement with Raja Gulab Singh and that separate arrangement was the payment of Rupees seventy-five lakhs for the territory of Kashmir. The present writer submits that when you accept money in consideration for a transfer of a material thing, the transaction is nothing but 'sale'. The Imperial Gazetteer refers to this transaction in the following words:

> "It is said of the first Maharaja Gulab Singh....that when he surveyed his new *purchase*, the valley of Kashmir...".[17]

Undisputedly, a person cannot purchase something unless it has been sold to him and if it is sold the transaction is a 'sale'. At the time of the 'sale of Kashmir' no consideration was given to the moral effects of the deed. Millions of people were sold like sheep and cattle and the whole transaction was made behind their backs. The Treaty of Amritsar consisting of ten Articles made no mention whatsoever, of the rights, interests or the future of the people of the State. Unlimited power was transferred to a Dogra Hindu Ruler to rule over the Muslim majority population. Since, in the Indian Native States absolute autocracy was the principal characteristic of the political life at that time; no voice was raised against this transaction in the State but outside the State sympathy was shown towards the masses in Jammu and Kashmir:

> "Towards the people of Cashmeer we have committed a wanton outrage, a gross injustice, and an act of tyrannical oppression which violates every human and honourable

16 Panikkar, K.M., *The founding of the Kashmir State*, London, 1953, 2nd impression, p. 104.

17 *Imperial Gazetteer of India*, p. 73.

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sentiment, which is opposed to the whole spirit of modern civilization, and is in direct opposition to every tenet of the religion we profess."[18]

In British India, Dr. Mohammed Iqbal, the great Urdu poet wrote:

"Their fields, their crops, their streams,
Even the peasant in the vale ;
They sold, they sold all, alas !
How cheap was the sale."[19]

The English historian Cunningham referred to this transaction thus:

"...the transaction scarcely seems worthy of the British name and greatness."[20]

However, the unfortunate thing had been done. Mrs. Bruce wrote, "Gulab Singh being a wise man, took the side of the British and his reward was one altogether out of proportion to his services. He was presented with the Kingdom of Kashmir under payment of a nominal sum...".[21] In fairness to the British Government it must be observed that they did what they believed necessary to stabilise the situation in N.W. India. The Sikhs had been growing in power and were a constant menace to the British and so "it was necessary...to weaken the Sikhs by depriving them of Kashmir".[22] One object which the Governor-General had in view when he made this arrangement for the Jammu and Kashmir territories was to curb the power of the Sikhs "by establishing on their flank a power

18 Thorp, Robert, *Cashmeer Misgovernment*, London, 1870, p. 66.
19 As translated and quoted by Bazaz, P.N., *The history of struggle for freedom in Kashmir*, p. 123.
20 Cunningham, J.D., *A History of the Sikhs*, Calcutta 1903, p. 380.
21 Bruce, Mrs. C.J., *Kashmir*, London, 1911, p. 30.
22 *Life of Lord Hardinge*, Oxford, 1891, p. 133.

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independent of them and inclined to the British".[23] However, since "Kashmir is a country which Europeans might have colonised",[24] why should they have separated Kashmir from Punjab, when in 1848-49, the British acquired the Punjab also? The answer to this is two-fold. Firstly, "no one then (in 1846) imagined that Punjab would become a British province in less than three years".[25] Secondly, geographical factors were important. The British were reluctant to add to their frontier commitments. The distance from the British Base, Ferozepur, to Kashmir was about 300 miles. This distance was over very difficult mountainous country, impassable for six months in each year, when the roads were covered with snow. Keeping a British force 300 miles away from its base and with communication between them cut for six months in each year was a situation no British general could have approved. What the British did was a practical solution to a difficult problem and this "arrangement was mutually advantageous for the company and the Dogras".[26]

Under such circumstances was the State of Jammu and Kashmir created. The whole area was brought under the control of one single ruler, but this did not mean, as we shall presently see, that the country was unified. "The mountainous character of the country and the paucity of communications prevented the growth of anything like a common sentiment of nationality... . The different communities continued to live a separate existence till the repercussions of the freedom struggle in India inspired the National Conference to unite the Kashmiri people".[27]

23 Drew, Fredric, *Territories of Jammu and Kashmir State*, London, 1875, p. 22.

24 Barton, Sir William, *op. cit.*, p. 122.

25 Sapru, *Monograph No. 14* (Punjab Government record office publication).

26 Huttenback, R.A., 'Gulab Singh and the creation of the Dogra State of Jammu, Kashmir and Ladakh', *The Journal of Asian Studies*, Michigan, Vol. XX, No. 4, August 1961.

27 Research Institute of India, *The Kashmir Question*, Lucknow, 1950, p. 3.

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(2) STATE OF JAMMU AND KASHMIR UNDER MAHARAJA GULAB SINGH

The Treaty of Amritsar gave Gulab Singh the title deeds to Kashmir, but actual possession had yet to be taken. As Huttenback observes, "the final act of the Drama was to be played in Kashmir itself; Gulab Singh still had to defeat the Sikh Governor, who was unwilling to surrender the province".[28] With the help of a small force lent by the East India Company, Gulab Singh was able to get the possession of the province of Kashmir on November 9, 1846.[29]

Having obtained his kingdom most of Gulab Singh's time was devoted towards the consolidation and building up of Jammu and Kashmir State. He had hardly any time left for setting up an administration, though he did make a few changes. He tried to rule the country justly. "The Maharaja looked carefully into the revenue administration of Kashmir. Gazing at the valley from the hills, he said that one part was mountain, one part under water, while the remaining third part was in the hands of *Jagirdars*. He very soon altered this, and by dint of untiring industry and strict supervision of his officials, made the most of the revenues of the valley...".[30] It was the rule of one man in whom were vested all powers, legislative, judicial and executive, and who, in order to stabilise his position, inflicted exemplary punishments on his people.[31] "The Maharaja himself could be approached by any of his subjects who sought justice at his hands".[32] Gulab Singh had been a warrior so it is not surprising to find him constructing forts and defence chambers. He was not educated but was very able. "He must be judged with reference to the morality of his age and race, and to the necessities of his own position. If these allowances be made Gulab Singh would be found an able and

28 Huttenback, R.A., *op. cit.*

29 Lawrence to Sir Fredrick Currie, dated 12th November, 1846; as reproduced in Edwardes and Merivale, *Life of Sir Henry Lawrence*, 3rd Edition, London, 1872, Vol. II, p. 77.

30 Lawrence, Sir W., *The Valley of Kashmir*, pp. 201-202.

31 Kaul, G.L., *Kashmir through the ages*, p. 112.

32 *Ibid*, p. 130.

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moderate man, who does little in idle or wanton spirit, and who is not without some traits both of good humour and generosity of temper".[33]

Gulab Singh died on 25th of Sawan, 1914 (A.D. 1858), the same year as witnessed the horrors of the Indian Mutiny. He was succeeded by his son Ranbir Singh.

(3) STATE OF JAMMU AND KASHMIR UNDER MAHARAJA RANBIR SINGH

Ranbir Singh was the third son of Maharaja Gulab Singh and he succeeded to the throne on 18th Phagan, 1922 (1856 A.D.), about two years before his father's death. He was a person of versatile genius. Sir Richard Temple bears testimony to the high character of the Maharaja. "His (Ranbir Singh's) private life seemed to be good. He rode out daily and was certainly free from many frivolities and vices which too often disguise the private conduct of Oriental Princes".[34]

Gulab Singh, as we have already seen, had devoted most of his time towards the consolidation of his kingdom and had not been able to set up a proper administration in the State. When Ranbir Singh ascended the throne, it fell to his lot to improve the administration. He studied the position of the State thoroughly and found that the main cause of haphazardness was that the provinces of Jammu and Kashmir were so big that large areas of them were practically unadministered, so he divided the provinces. The Jammu province was divided into seven 'wazarats': (1) Jammu Khas; (2) Jasrota; (3) Ram Nagar; (4) Reasi; (5) Udhampur; (6) Nowshera Khas and (7) Minawar. The pattern was borrowed from the adjoining Punjab. Similarly, the Kashmir province was divided into six "wazarats": (1) Shahar-i-khas ; (2) Anantnag ; (3) Shopian;

33 Cunningham, J.D., *op. cit.*, p. 381 footnote.
Since there are no published or unpublished administrative reports of Gulab Singh's reign, the present writer regrets his inability to quote from those. He has tried his best to sift the evidence from available published works, to assess the relative significance of each one of those accounts.

34 Sir Richard Temple, *Journals*, p. 143.

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(4) Pattan ; (5) Kamraj and (6) Muzzafarabad. The only difference between the administrative arrangements in the two provinces was that the Maharaja himself governed the Jammu province, while Kashmir was administered by a Governor appointed by him. This may account for the feeling amongst the people of Kashmir province that the Maharaja did not regard them as "his own".[35]

After this administrative division, the Maharaja turned his attention to the revenue administration. During Maharaja Gulab Singh's reign, the revenue was collected in kind and not in cash. Maharaja Ranbir Singh very soon altered this and in 1860 abolished the collection of revenue in kind in the Jammu province. This method of collection proved favourable to the cultivators and advantageous to the Government. The mode of revenue collection in the Kashmir province however, remained unaffected till the reign of Maharaja Pratap Singh, when it was abolished there also.

The judiciary was not lost sight of either. An Adalat Sadar (Chief Court) was created at Jammu and another at Srinagar. All cases of importance used to be decided by this court and the Maharaja himself used to take a keen interest in the administration of justice.[36] In 1877, an Adalat-i-Alia (High Court) was established and its powers were defined as:

> "The High Court (Adalat-i-Alia) shall be deemed for the purposes of all enactments for the time being in force to be the highest court of appeal or revision, subject to the control and the judicial powers exercised by His Highness the Maharaja Sahib Bahadur. The general superintendence and control over all other Civil Courts shall be vested in, and all such courts shall be subordinate to the High Court."[37]

There were in all 25 courts in the State of which 14 were

35 See also Ch. 3 post.

36 In the absence of the administrative reports, the information is based on Kaul, G.L., *op. cit.*, p. 90.

37 *The Jammu and Kashmir State Civil Courts Regulation*, 1877.

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'wazarat' courts. *The State Civil Procedure Code* was published in 1873 A.D.[38] Although Maharaja Ranbir Singh tried to improve the administration of the country yet, all executive and judicial powers remained vested in the Ruler.

The Maharaja was not neglectful of his armed forces. The army, except the artillery, was, for a native force, fairly well equipped and efficient, copying, after a fashion, the British drill and dress. The troops were stationed all over the country in detachments, garrisoning innumerable forts. The army consisted almost entirely of Dogras, Dards and Punjabis. There were practically no Kashmiris, Baltis and Ladakhis in the army. According to Kaul, "the Kashmiris were disqualified for military service".[39] In fact, Ranbir Singh, like his father, wanted to exclude every community other than his own from the army and the high offices in the State. "They established a sort of Dogra imperialism in the State in which the Dogras were elevated to the position of the masters and all non-Dogra communities and classes were given the place of inferiors".[40] This discrimination continued throughout his reign and was inherited by his son Pratap Singh.[41] Ranbir Singh had remained a friend of the British and at the time of Indian Mutiny had led the State forces in putting down the mutiny. In recognition of his services, the British conferred on Maharaja Ranbir Singh the honour of Grand Commander of the Star of India.

Hitherto, there had been no direct association of the British with the affairs of the State, and the "political relations between the State and British India were conducted through the Punjab Government up to 1877".[42] In 1870, with the consent of the Maharaja, an Officer on Special Duty, was appointed in Srinagar to look after the Europeans holidaying in Kashmir during the summer months. In 1872, a mixed court of British and State officials was set up to try civil suits between European

38 *The Jammu and Kashmir Administrative Report*, 1911.
39 Kaul, G.L., *op. cit.*, p. 92.
40 Bazaz, P.N., *op. cit.*, p. 127.
41 See page 25 below.
42 Government of Jammu and Kashmir, *A handbook of Jammu and Kashmir State*, Jammu, 1947, p. 26.

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British Subjects and their servants on the one hand and the subjects of His Highness the Maharaja on the other.[43] In 1877, the Officer on Special Duty was placed directly under the Government of India.[44]

Maharaja Ranbir Singh was a strong Ruler and well able to look after his interests. When, because of the proximity of Czarist Russia on the north of the State, the British Government desired to appoint a Resident in Kashmir, the Maharaja put his foot down. He reminded the British Government that under the Treaty of Amritsar, 1846, as well as by the Proclamation of the Queen Empress of 1858,[45] they (British) could, under no circumstances, interfere in the internal administration of the State. The British dropped the matter for the time being. "So long as Maharaja Ranbir Singh is alive, the Government of India do not propose to make any change in their existing policy" were the instructions given to the Officer on Special Duty in Kashmir.[46]

In the year 1885 A.D. Ranbir Singh fell ill and died on September 14 in the same year. The Viceroy of India in his letter of condolences to Mian Pratap Singh wrote, "Maharaja Ranbir Singh rendered valuable service to the British Government, I feel that his loss is the loss of a friend".[47] He was succeeded by his son Raja Pratap Singh.

(4) STATE OF JAMMU AND KASHMIR UNDER MAHARAJA PRATAP SINGH

Maharaja Pratap Singh ascended to the throne in 1885 A.D.

43 *Ibid.*, p. 26.

44 *Ibid.*, p. 26.

45 *Proclamation by the Queen in Council, to the Princes, Chiefs and People of India*, November 1, 1858, Published by the Governor-General at Allahabad.

46 Encl. No. 1 to the letter from Government of India to the Secretary of State for India, Simla, October 19, 1885; H.M.S.O., Papers relating to Kashmir—*Parliamentary papers*, 1890, p. 6.

47 Letter from Viceroy and Governor-General of India to Mian Pratap Singh, Simla, 14th September, 1885—*Parliamentary papers relating to Kashmir*, 1890, p. 11.

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Despite a short interruption due to his deposition by the British Government in 1889,[48] his reign lasted for about forty years.

In 1885 Ranbir Singh died. The British wanted to appoint a Resident in Kashmir because of the activities of Czarist Russia beyond the borders of Kashmir. Ranbir Singh had not allowed the British to appoint a Resident during his lifetime. "The late Maharaja was a man of strong will and resolution,"[49] and would not yield to the pressure of the British Government. Now that he was dead, the British took advantage of the situation while Pratap Singh was in mourning and despatched the resident-designate, Mr. Plowden, to Kashmir. Immediately on his arrival in Jammu, Plowden insisted on seeing the Maharaja, even though it was against Hindu custom for the Maharaja to have any official visitors during the mourning period. Because of his insistence, the Maharaja consented to see Plowden. A hurried conference of the members of the family to which the Prime Minister was also invited was called. At this meeting, Plowden announced that the British Government wished to appoint a resident. Pratap Singh, who was in a state of mental depression due to the death of his father was shocked at this behaviour of the British Government. Pratap Singh told Plowden that there was no stipulation in the Treaty of Amritsar of 1846 to this effect but his protests were of no avail. The Secretary of State for India had sanctioned this appointment to the Government of India in the following words:

> "In 1846 it was decided not to appoint a political officer to reside permanently at the Maharaja's court, whilst in 1873, when the measure was recommended by Lord Northbrook's Government, the necessity for it did not seem to Her Majesty to be so clearly established as to justify them in disregarding objections which were expressed by authorities entitled to respect. But in the interval which has since elapsed circumstances have greatly changed; and whether regard be had....to the events beyond the border, which has materially increased the political importance of Kashmir,

48 See page 29 below.

49 Digby, Williams, *Condemned Unheard*, 1890, London, p. 23.

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the appointment which you request a discretionary authority to make appears to be not only desirable but necessary...."[50]

Thus a Resident in Kashmir was appointed but we shall presently see that this was only the first step in the designs of the British Government in regard to Kashmir.

Ranbir Singh had started the improvement in the administration. Pratap Singh took it further.

The State Civil Procedure Code of 1873 was not a complete code ; Maharaja Pratap Singh desired to improve it and he was able to do so in 1896 through his Council of Ministers.[51] Judicial Circular No. 201, passed under resolution No. 39, dated 11th January, 1896, authorised the adoption of many important British Indian Acts, in so far as the contents were not repugnant to any law or practice established in the State.[52] The total number of Courts was also increased to 90.[53]

He took a keen interest in the affairs of the army. He reorganised the force and supplied it with modern equipment. However, he, like his father and grandfather, did not give any chance to the Kashmiris to serve either in the army or in the civil service. Resentment against the Rulers kept on growing amongst the Kashmiris, particularly amongst the Kashmir Muslims.

In 1888, the British Government asked the Maharaja to make certain reforms in the administration. In the same year, the Maharaja sent a sealed letter to the Viceroy in which he proposed a new constitution for the State.[54] The plan was statesmanlike. The Maharaja proposed a new Council of which he was to be the President,[55] his brother Amar Singh was to be Vice-Presi-

50 Secretary of State for India to the Government of India, 23rd May, 1884, in *Parliamentary papers relating to Kashmir* (1890), p. 5.
51 See page 23 below.
52 *Administrative report for 1904-5*, p. 29.
53 *Ibid.*, p. 37.
54 *The proposed new Constitution of Jammu and Kashmir Council*, as published in the *Parliamentary papers relating to Kashmir*, 1890, p. 19.
55 *Ibid.*, Section 2.

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dent and Prime Minister,[56] while his other brother Ram Singh was to be the head of the army.[57] Beside these three brothers, two others were to be the members. The were M/s Babu Nilambar Mukerji and Dewan Janki Parshad.[58] Raja Amar Singh was to be in charge of the Judicial and Foreign Department as well. Babu Nilambar Mukerji was to be the Revenue Member and miscellaneous portfolios were to be allotted to Dewan Janki Parshad.[59] It was provided in the Constitution:

"(11) The Council shall sit three days in the week, authorised holidays excepted, and any extraordinary meeting shall be held, on the requisition of the Prime Minister.

(12) It shall be the duty of the Council to legislate and hear and pass opinion on all subjects that may be brought forward by the Members.

(13) The Council shall, on meeting, frame rules for its guidance, which may be removed or modified by it only.

(14) All matters shall be decided on majority of votes."

.....

.....

Lord Dufferin, the Viceroy and Governor-General of India, however, did not accept the Constitution without reservations. He wrote that the distribution of portfolios was not good, apart from other shortcomings of the plan.[60] The plan, however, came into operation in 1889.[61] It is noteworthy that in Kashmir a step was taken to share the powers with other members of the Council, while absolute autocracy was the principle of political life in other Indian Native States. In

56 *Ibid.*, Section 9.
57 *Ibid.*, Section 8.
58 *The proposed new Constitution of Jammu and Kashmir Council, op. cit.*, Section 7.
59 *Ibid.*, Section 8.
60 Viceroy and Governor-General of India to Pratap Singh, Simla 25th July, 1888, in *Parliamentary papers relating to Kashmir*, pp. 21-22.
61 Rai Sahib Dewan Amar Nath, *Jammu and Kashmir Administration Report*. s. 1961 (1904-5 A.D.), p. 2.

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the proposed Council, however, Muslims were conspicuous by their absence.

The Chief Executive authority in the Provinces of Jammu and Kashmir was exercised by the Provincial Governors, who in the Revenue Department were under the Revenue Member of the Council; the Chief Judicial authority vested in the provincial Chief Judges who were under the judicial member of the Council.[62]

The Legislative authority was vested in the State Council which enacted laws, in the form of resolutions based "usually on draft rules and regulations proposed by the members concerned and considered and sanctioned by His Highness in Council".[63]

The High Court, which was the court of the Judicial Member, was the Highest Court in the State. Appeals from it lay to His Highness in Council.[64]

By establishing this Council, the Maharaja had tried to lessen the interference of the Resident and the British were not very happy about it. They wanted the Resident to be in complete charge of the State. Because of a court intrigue growing out of the fact that the Maharaja had no son to succeed him, the British were successful in playing off the Maharaja's brother against him. Pratap Singh was obliged to accept an arrangement by which he was relieved of all parts of the administration, which was placed. subject to the control of the Resident, in the hands of a Council of Regency. The Council of Regency consisted of:

1. Raja Amar Singh,
2. Raja Ram Singh,
3. An experienced European (name not disclosed in the document),
4. Rai Bahadur Pandit Bhag Ram,
5. Rai Bahadur Pandit Suraj Kaul.[65]

62 Rai Sahib Dewan Amar Nath, *Jammu and Kashmir Administration Report, op. cit.*, p. 2.
63 *Ibid.*, p. 28.
64 *Ibid.*, p. 34.
65 *Parliamentary papers relating to Kashmir*, 1890, pp. 26-27.

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The Muslims were absent from the Council or Regency appointed by the British also. This deprivation to the Muslims increased their resentment even more.

To justify the temporary deposition of the Maharaja, the British Government took shelter under many different pretences. Firstly, the Government alleged that the Maharaja had entered into "treasonable correspondence" with Russia. Mr. Bradlaugh, M.P., voiced the opinion in the House of Commons that there was no such correspondence and demanded that the letters be made public. The Under-Secretary of State for India was then made to say, "These letters, in spite of what the Hon'ble member (Mr. Bradlaugh) says, have never been taken by the Government of India as serious, nor have they been made the ground for the exclusion of the Maharaja from interference in the public affairs of Cashmere".[66] The British then shielded themselves under the pretence that the Maharaja's administration was bad, that the Treasury of Kashmir was empty, and that the taxes were too heavy. That both these charges were ridiculous was shown by Digby. "An empty Treasury ? Yes ; emptied by those who make its emptiness an excuse for what, if done by other than Englishmen, would lead Englishmen to stigmatise it as brutal, high handedness, accompanied with robbery of a neighbour's territory".[67] In the 3rd July debate Dr. Hunter commented in the House of Commons, "we are told that the land revenue is extortionate. That is no doubt the reason that you are putting out the Maharaja and putting in yourself".[68] When the British Government was being cornered both in the House of Commons and the Press, it took shelter on the ground that the temporary deposition of Pratap Singh was based on an "edict of resignation" by Maharaja Pratap Singh which purported to delegate the ruling powers to a Council for five years. It is, however, difficult to accept this plea of the British Government that the Maharaja had resigned. If we look to the language of Lord Dufferin's letter, wherein he accepted the so called 'resignation',

66 *Hansard's Parliamentary Debates*, July 3, 1890, pp. 701-31 (21).
67 Digby, Williams, *op. cit.*, p 89.
68 *Hansard's Parliamentary Debates*, July 3, 1890, pp. 701-81.

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we find that he does not use the term 'resignation' but on the contrary says, "The Maharaja will be expected to refrain from interference in the Administration".[69] The British Government was unable either to justify this act or to convince the public of its necessity.

The excellent qualities of British Government need no exposition but, while recognising laudable intentions, we cannot commend acts which were contrary to justice. That a rightful ruler should be deposed and two million and a half people deprived of their rightful ruler was a gross injustice. It was devoid of any sense of fairness and justice towards the ruler Maharaja, Pratap Singh also. However, this was not the British Government's policy for Kashmir alone. Sir Edwin Arnold, in his famous book on Lord Dalhousie's Administration wrote in 1865, "In 1853 the Nizam came into our power by a process which has been often and successfully repeated in our Indian annals. There is a curious phenomenon in the insect world where an egg is deposited in the body of a living creature, which nourishes itself upon the substance of its unwilling nurse, gradually taking up all the fat, flesh and tissues of the victim, till it dies or drags on a futile existence. Our Government in India has frequently laid such an egg in the shape of a 'contingent' within the confines of a friendly State. Oudh, Gwalior, and the territories of Scindia were thus treated and by no other means were the Dominions of the Nizam brought within the grasp of Lord Dalhousie".[70] This comment by Sir Edwin in 1865, held good in 1889, in the case of Kashmir too, where the story in the 'Arabian Nights' about the "Camel and the Hutman" finds its exemplification—First the Resident arrives. He wants to offer condolences and there declares his position. At first he is not to interfere, he is merely to advise. Then he does interfere and finally he becomes the virtual ruler by getting the rightful ruler deposed.

Political controversy regarding the morality of the act aside, the act was not only a violation of the Treaty of Amritsar,

69 *Parliamentary Papers relating to Kashmir*, 1890, pp. 35-38.
70 Arnold, Sir Edwin, *Marquis of Dalhousie's Administration of British India*, 1865, London, Vol. II, p. 131.

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1846, but also contrary to the solemn promise made by the Queen Empress on her assumption of direct rule in India in 1858, The Queen Empress had declared:

> "We hereby announce to the Native Princes of India that all Treaties and Engagements made with them by or under the authority of the Honourable East India Company are by Us accepted, and will be scrupulously maintained; and we look for the like observance on their part.
>
> We desire no extension of our present territorial Possessions; and while we will permit no aggression upon Our Dominions or Our Rights, to be attempted with impunity, we shall sanction no encroachment on those of others. We shall respect the Rights, Dignity, and Honour of Native Princes as Our own; and We desire that they as well as Our subjects, should enjoy that Prosperity and that social Advancement which can only be secured by internal peace and good Government."[71]

It is more than clear, that, in the action the British Government took, they went back on this promise. However, beyond protesting, the Maharaja had no other course open to him. The action of the British Government was an 'act of the state' and could not be challenged in any Court of Law. As early as 1876, it had been held that matters which fall properly to be determined by the Crown as 'acts of state' are not subject to the jurisdiction of the Municipal Courts.[72]

Of course, 'acts of state' are not all of one kind. Their nature and consequences may differ in an infinite variety of ways. For instance, an 'act of state' may fix the relations between two States, each of which continues to possess an independent existence. The consequences of such an 'act of state' are entirely beyond the cognizance of the municipal courts, because they have no jurisdiction over Treaty obligations between independent States.

71 Proclamation by the Queen in Council to the Princes, Chiefs and People of India, 1st November, 1858.

72 *Rustomjee* v. *Queen* [(1876) 2 Q.B.D. 69 at 73)].

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In *Kamachee Boye Sahba's case*,[73] Lord Justice Kingsdown summarised the position very clearly. In this case, after the death of the Raja of Tanjore, who was the independent sovereign of an Indian Native State, the East India Company, in 1885, in the exercise of their sovereign powers thought fit to seize the property of the State as well as the Raj of Tanjore, and did seize it accordingly. The Raja had died intestate. The eldest widow of the Raja filed a case in the Supreme Court of Judicature at Madras. The Supreme Court decreed that the widow was entitled to inherit the property. An appeal was preferred against this decree by the East India Company. The Judicial Committee of the Privy Council reversed the decision and observed:

> "The transactions of independent states between each other are governed by other laws than those which the municipal courts administer, such courts have neither the means of deciding what is right, nor for enforcing decision which they may make"... . "The act so done (act of the East India Company) with its consequences, is an act of state, over which the Supreme Court of Madras has no jurisdiction".

Thus the Maharaja knew that no court would entertain his complaint.

> "It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal Court of Justice can afford a remedy."[74]

The Maharaja did not go to Court. He wished to apply diplomatic pressure but there was nobody through whom he could apply the pressure. He did not have any direct connections with the Government of India. The only mode of communication between him and the Government of India was through the Resident and to apply pressure through the Resident was out

73 *Secretary of State for India* v. *Kamachee Boye Sahba* [(1859) 13. Moo. P.C. 22].
74 *Secretary of State for India* v. *Kamachee Boye Sahba, op. cit.*

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of the question. The only course left to the Maharaja was to wait for a change in his fortune!

Since 1887-1888, Russia had directed her attention to the Far East in a policy which led to the Russo-Japanese war in 1904, and resulted in the triumph of Japan. During this period Russian power in the Middle East declined, though her attitude appeared to be more threatening. Russia's activity was confined to the penetration of Northern Persia. The British strengthened their influence in the South and counteracted the Russian permeation of the North. Their position became pretty strong. They had made good use of the territory of Kashmir to strengthen themselves. So, "after we had obtained what we wanted from Kashmir, the Maharaja was restored to the throne in 1905 but was subject to the veto of the Resident".[75] The Maharaja kept on working with limited powers till 1921, when his powers were further extended and, to give a pleasant ending to a tragic drama, the British Government made Maharaja Pratap Singh a Grand Commander of the Star of India.

After the restoration of his powers, the Maharaja was confronted with a new problem. During his deposition, western educated men from the neighbouring Punjab and other places, had been appointed in large numbers to posts in the administration. Kashmiris, who had hitherto been excluded from the affairs of the State, strongly resented this new encroachment from outside. 'Armies of outsiders trailed behind the officers from the plains with no more interest than to draw as much as they could, and then to depart leaving behind their kindred as successors to continue the drain...".[76] Even the Dogras now suffered unemployment. As education advanced, this resentment, which had been growing for the past half-century became even stronger. The slogan "State for the State's People" came to be heard everywhere but the Maharaja paid little heed to this growing movement. Neither the Maharaja nor his councillors then imagined that this demand of the people would one day lead to a strong agitation which would have to be faced by his successor and which would cost him his throne.

75 Nicholson, A.P., *Scraps of paper*, London, 1930, p. 110.
76 Bazaz, P.N., *op. cit.*, p. 135.

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Sir Pratap Singh died in 1925, intestate. He was succeeded by his nephew Hari Singh, the only son of his brother Amar Singh.

(5) STATE OF JAMMU AND KASHMIR UNDER MAHARAJA HARI SINGH

Hari Singh ascended the throne in 1925. Even before that, he had been associating with the administration of the State. He was the first Dogra Prince to receive education in a Public School. He studied at Meo College, Ajmer and in the Imperial Cadet Corps, Dehradun. After his return from Dehradun, he was appointed Commander-in-Chief of the State Army. At the age of 27, he was appointed Senior Member in the State Council.[77]

We have seen in the last section that during the reign of Maharaja Pratap Singh an agitation with the slogan 'State for State's People' had started; this agitation grew stronger as time went by. In 1927, the agitation was so strong that the Maharaja was forced to issue a definition of the term 'State Subject'.[78*]

"The term 'State Subject' means and includes:

Class I: All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also persons who settled therein before the commencement of Samwat year 1942 (1885 A.D.), and have since been permanently residing therein.

Class II: All persons, other than those belonging to Class I who settled within the State before the close of Samwat year 1968 (1911 A.D.), and have since permanently resided and acquired immovable property therein.

Class III: All persons, other than those belonging to Class

77 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State*, 1947, p. 31.

78 *The State Subject Definition Notification,* No. I-L/84, dated the 20th April, 1927.

* For full text see Appendix VI.

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I and II permanently residing within the State, who have acquired under a *rayatnama* any immovable property therein or who may hereafter acquire such property under an *ijazatnama* and may execute a *rayatnama* after ten years' continuous residence therein."

The Notification in Note I provided the privileges of the State Subjects:

"Note I: In matter of grants of State scholarships, State lands for agriculture and house building purposes and recuitment to State service, State Subjects of Class I should receive preference over other classes and those of Class II, over Class III, subject however, to the order dated 31st January, 1927, of His Highness the Maharaja Bahadur regarding employment of hereditary State Subjects in Government service."

His Highness's order of 31st January, 1927 provided that the 'Mulkis' (State Subjects) would be preferred to outsiders in cases of employment in Government services.

This step gave some relief to the people of the State, as, apart from the fact that they could now hope to get employment in the State, clause II of the order forbade outsiders to purchase immovable property in the State. This was to stop the exploitation of state subjects by their well-to-do neighbours. However, although the recruitment to the state service of persons who were not state subjects was stopped, the definition did not give equal opportunities to all communities residing within the State. "With Hari Singh's pro-Dogra policy in operation, the people of Jammu, particularly the Rajputs, got most of the big jobs while Pandits were recruited as clerks in offices vacated by the Punjabis. Needless to say the Muslims were as yet out of the picture."[79] The degree of communal discrimination was revealed by the facts that even now, under the State's Arms Act, only Rajputs and Dogras were permitted to own and utilise firearms. Non-Dogras were not given any chance to

79 Bazaz, P.N., *op. cit.*, p. 146.

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serve in the army till 1930.[80] The discrimination was further exemplified by section 298-A of the *Ranbir Penal Code*,[81] which provided for ten years imprisonment for the slaughter of a cow, "wild or domesticated;" according to the States' *Criminal Procedure Code*, 1989 (1933 A.D.), the offence was non-bailable.[82]

However, now the oppressed were beginning to become vocal. With the "awakening of feelings of self-respect amongst the oppressed Kashmiri Moslems,"[83] a wave of disaffection swept over the entire State. The State of affairs in Kashmir was really sad. Sir Albion Banerjee, Prime Minister of Kashmir till he resigned in 1929 because of the policies of the Maharaja portrayed the state of affairs thus:

> "Jammu and Kashmir State is labouring under many disadvantages, with a large Mohammedan population absolutely illiterate, labouring under poverty and very low economic conditions of living in the villages, and practically governed like dumb driven cattle. There is no touch between the Government and the people, no suitable opportunity for representing grievances... . The administration has at present little or no sympathy with the people's wants and grievances."[84]

The Year 1931 is a very important year in the history of the State. It was in this year, that, inspired by the movement in India, some educated Kashmiri Muslims picked up the courage to voice their grievances against discrimination. They met with a tremendous response and in 1931 the oppressed Muslims revolted in Kashmir against communal discrimination. The Government of the State was not prepared to let the agitation spread and so the repressive machinery of the Government was set in motion.

On September 24, 1931, His Highness promulgated Notifica-

80 *Jammu and Kashmir Administration Report*, 1931, pp. 6-10.
81 Act XII of 1989 (1932 A.D.).
82 Schedule II of Act XXIII of 1989 (1932 A.D.).
83 Barton, Sir Williams, *op. cit.*, pp. 127-8.
84 As quoted in *All India State People's Conference*, *op. cit.*, p. 6.

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tion No. 19-L of 1988, providing for the "conferment of special powers upon certain...officers for the suppression of disorder and the restoration and maintenance of law and order," in the State. This Notification was issued to direct the course of martial law in Kashmir. The most striking feature of the Notification was the 'Power to arrest turbulent persons'[85]:

"(1) A competent authority may arrest without warrant any person against whom a reasonable suspicion exists that he has promoted or assisted to promote disaffection against the authority of Government or that he has acted or intends to act in a manner prejudicial to the restoration or maintenance of law and order.

(2) In making such arrests a competent authority may use any means that may be necessary.

(3) A competent authority making such arrest shall forthwith commit any person so arrested to jail in Srinagar."

Under the same Order, i.e. order of September 24, 1931, His Highness was pleased to appoint:

(a) all military state officers (from the rank of brigadier to second lieutenant inclusive),
(b) district magistrates, Kashmir and Jammu,
(c) all police officers of and above the rank of sub-inspectors,

competent authorities to exercise any of the powers conferred by Notification No. 19-L within the municipal limits of the city of Srinagar and within the municipal limits and cantonment of the City of Jammu. This Notification was withdrawn by a Proclamation of His Highness the Maharaja Bahadur on October 5, 1931, after being in force only for a few days but not before "thousands (of people) were incarcerated without trial".[86]

The ruthlessness of the Government did not deter the people

85 Section 3, *Notification No. 19-L of 1988* (A.D. 1931).
86 All India State People's Conference, *Kashmir*, p. 7.

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of the State from continuing their struggle. However, when the Maharaja found that, despite all his repressive machinery, the movement could not be crushed, he announced a general amnesty and proclaimed that, if any section of his subjects desired to submit its reasonable demands, they would receive his sympathetic consideration.[87]

Following this announcement several memorials were submitted to the Maharaja by members of the different communities. Although different in many respects, the memorials had at least one common feature—the demand for a representative assembly and a system of Government by an Executive of Ministers.

The Muslim Memorial listed a number of grievances and demanded an increase in their representation in the public services in accordance with the percentage of the population. Added to this was the demand of "perfect equality of rights and equality of treatment for all State subjects".[88] The Maharaja considered these demands very carefully and sympathetically because of the fierce political unrest in the State. The rule of Hari Singh was oppressive and the taxes were very heavy. Everything and everybody was taxed—"carpenters, boatmen, butchers, bakers even prostitutes, were taxed".[89] But in fairness to the Maharaja it has been observed that "it is easy to blame the Maharaja in terms of the standards of Western free democracy. It is not quite so fair to condemn when we assess him along with others of his order, and remember that British policy in general terms allowed princes to live and let live... ."[90]

> "Put Hari Singh in the company of his contemporary six hundred and odd Rajas and Nawabs of the Native Indian States and you will find his dark spots to be far dimmer."[91]

True to his announcement that he would give sympathetic

87 *Ibid.*, p. 7.
88 All India State People's Conference. *op. cit.*, p. 8.
89 Birdwood, Lord, *Two Nations and Kashmir*, London, 1956, p. 31.
90 *Ibid.*, p. 31.
91 Puri, Balraj, 'Editorial', in *Kashmir Affairs*, Vol. III, No. 10, Delhi, March-April 1961.

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consideration to the reasonable demands of any section of his people, Maharaja Hari Singh set up a Committee to enquire into the grievances and to make such recommendations as it deemed necessary.[92] The Commission was presided over by Mr. (later Sir) B.J. Glancy of the Indian Political Department and had M/s P.N. Bazaz, G.A. Ashai and Ghulam Abbas as its members. Mr. Lok Nath who was nominated as a member from Jammu did not remain a member for any length of time and resigned. In the report submitted later his name does not appear at all. The reason assigned for the withdrawal of the Jammu member being "that the Commission found itself unable to exclude from the scope of enquiry questions relating to the Hindu Law of Inheritance".[93] The Commission submitted its report on 22nd March, 1932.

(6) RECOMMENDATIONS OF THE GLANCY COMMISSION

The Commission under the chairmanship of Mr. Glancy began its sittings before the end of November in Srinagar. In the middle of January 1932 the Commission left Srinagar and moved down to Jammu. The Commission enquired into the complaints and grievances of the different communities and submitted its report to His Highness the Maharaja Bahadur on 22nd March, 1932. Briefly its recommendations were as follows:

1. Religious

(i) that there should be no interference with religious observance;

(ii) all officers concerned should make it their duty to see that the severest notice is taken of any action of insult to the religion, irrespective of the community to which the delinquent belongs:

92 *Commission appointed under the Orders of His Highness the Maharaja Bahadur, dated the 12th November, 1931, to enquire into the GRIEVANCES AND COMPLAINTS* (Unpublished Report).

93 *Ibid.*, p. 1.

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(iii) activities which tend to harass those who desire to change their religion should be strictly discouraged.[94]

2. Education

(i) the expansion of primary education should be accelerated and more attention should be paid to the provision of suitable buildings for primary schools;
(ii) the request of the Muslims of Jammu to have an Islamia High School in Gandoo Di Chawani deserves favourable consideration;
(iii) a regular programme for the construction of middle schools and high schools should be drawn up;
(iv) care should be taken to see that the Muslim Students receive all practical encouragement in matters of receiving education;
(v) that a higher proportion of the special Muhammadan scholarships grant should be allotted to high schools and colleges rather than to middle schools, in order to encourage higher education among Muslims;
(vi) in the matter of free studentships a due proportion should be allotted to all communities; also a fair share should be allotted to all communities in the matter of orphanage scholarships etc.;
(vii) efforts should be made to increase the number of Muslim employees in the teaching department as the number at that time was 'regrettably low';
(viii) a special Muhammadan inspector should be appointed to 'attend to the progress of Muhammadan education in all grades'.[95]

3. Emploment in State Services

(i) Muslims, who form the great majority of the population and are inadequately represented, should be given

94 *Ibid.*, pp. 3-8.
95 *Ibid.*, pp. 9-18.

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a greater share in matters relating to the employment to State Services;

(ii) minimum qualifications for appointment should not be pitched unnecessarily high;

(iii) all vacancies should be effectively advertised, and similar action should be taken as regards all scholarships intended to provide equipment for Government services;

(iv) effective measures should be taken to provide a system of appointment and machinery for supervising that system in such a way as to prevent the due interests of any community from being neglected;

(v) the policy of His Highness's Government in the matter of reserving State appointments for State Subjects should be adhered to as far as possible.[96]

By and large these recommendations were accepted by His Highness the Maharaja Bahadur and a notification to that effect signed by command of His Highness the Maharaja Bahadur was issued on 10th April, 1932.[97]

Another step was taken to remove the restrictions on the freedom of press and the platform. The Press Laws in the State were brought in line with those of British India.[98]

After the enquiry into grievances had been completed, a reform conference, with Mr. Glancy as President, was held to give effect to 'His Highness's desire to associate his people with the administration of the State'. "The Kashmir Constitutional Reforms Conference commenced its work about the middle of March 1932; its report was submitted in April. The Conference recommended that a Legislative Assembly should be established as soon as possible and made suggestions regarding its composition, powers and functions. At the same time the Conference suggested the appointment of a Committee to collect the necessary data on which further action could be based."[99]

96 *Ibid.*, pp. 19-25.

97 *Orders on the RECOMMENDATIONS contained in the Glancy Commission Report*, 2nd Edition, p. 8 (Typescript).

98 *Ibid.*, p. 8.

99 *Census of India*, 1941, Vol. 22, p. 5.

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In May 1932, a Franchise Committee under the Presidency of Sir Barjor Dalal was appointed. In March 1933, Sir Ivo Elliot, Bart., I.C.S. (Retired) was appointed Franchise Officer. The proceedings of the Committee were given fullest publicity. To facilitate the work of the Franchise Committee:

> "Lieutenant-Colonel Colvin, the Prime Minister of Kashmir, states that, in order to assure a favourable atmosphere for the work of the Franchise Inquiry Committee (appointed by the Maharaja), orders have been issued that prisoners of all communities, both those convicted and those on trial under the temporary regulation and notifications shall be released on giving an undertaking to refrain for the future from all forms of agitation."[100]

The Franchise Committee recommended that a Legislative Assembly on the Morley-Minto model be established, with the object of identifying the people with the administration. In other words it recommended a Council with a non-official majority which would pass legislation, ask questions, discuss budget and pass resolutions.[101]

On 22nd April, 1934, His Highness the Maharaja Bahadur enacted and issued a Constitutional Act[102] providing for the establishment of the Legislative Assembly and laying down his own Legislative, Executive and Judicial Powers. It also conferred authority on the Assembly to make rules for specified purposes.

(7) REGULATION NO. 1 OF SAMWAT 1991, (1934 A.D.)

The Regulation consisted of 46 Sections and began with the statement of policy, that it was the declared intention of the Maharaja to provide for the association of his Subjects in the matter of legislation and administration of the State. The Regulation then provided for the establishment of the Legislative Assembly for the State, called the 'Praja Sabha'.

100 *Keesing's Contemporary Archives* (1931), p. 339.
101 Barton, Sir William, *The Princes of India*, 1934, London, p. 127.
102 *Regulation No. 1 of Samwat 1991* (A.D. 1934).

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The Sabha was to consist of 75 members, 60 of whom were non-officials, including 33 elected members, 21 Muslims, 10 Hindus and 2 Sikhs. Thus, it was clear that in the convened Assembly the recommendation of the Commission for an elected majority was replaced by an official majority. This was the first step to hoodwink the people.

The franchise was very limited. It did not cover more than 3 per cent of the population. Women were altogether excluded from voting. Illiterates were not entitled to vote. The literate vote consisted mostly of the lawyers, medical practitioners, pensioned officers, title holders, village and district headmen, priests and managers of religious property. No person who did not have an yearly income of Rs. 400/- or more could vote.[103]

Under Section 3 of the Regulation, Maharaja Hari Singh fully reserved in himself all of his pre-existing legislative, executive and judicial powers.

Section 30 laid down that no measure should be deemed to have been passed by the Praja Sabha until and unless His Highness has signified his assent thereto. The Regulation left it to the absolute discretion of His Highness to assent to such a measure or not. A vote of the Sabha was not binding on the Council of Ministers and the Council had power to reject any Bill or resolution. The Sabha was only a recommendatory body subject to the control of the Council of Ministers. The Council of Ministers was responsible to His Highness and not to the Sabha. The members of the Council were *ipso facto* members of the Sabha. Any Bill effecting public revenues, maintenance and discipline of His Highness's troops and Privy Purse could not be introduced in the Sabha, as all these matters were 'reserved subjects'.

Elections were held to the Sabha in 1934 and in the first election ever held in the State of Jammu and Kashmir, the Muslim Conference, which had been formed in 1932, after the Maharaja had granted freedom to press and platform, under the leadership of Sheikh Mohammed Abdullah, captured 14 out of the 21 seats.

The Praja Sabha was formally inaugurated by the Maharaja

103 Government of India, *Elections in Kashmir*, 1957, p. 2.

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on October 17, 1934, in a special Darbar in the Rajgarh Palace in Srinagar.

However, all these steps did not pacify the people of the State. They were not content with the 'mock' assembly. They wanted a 'responsible government' established in the State. In fact His Highness had only added insult to injury. But the people had one advantage—they could make their voice heard. In 1932 the Muslim Conference was formed in Kashmir and met for the first time under the presidentship of Sheikh Mohammed Abdullah in October 1932 in Srinagar. The people were now able to air their grievances from the platform of the Muslim Conference. The Conference protested to the Maharaja against his failure to implement the recommendations of the Commission but no notice was taken of the complaint. On January 29, 1934, Sheikh Abdullah said:

> "The people of this country did not spill their blood for such a mock show... . What hopes can the people of this country have in this kind of representative Assembly where the dead weight of the official and nominated majority will always be ready to crush the popular voice."[104]

Though stimulating the hopes of the people of the State, the speech had no effect on the Government of the State. The Maharaja was in a way surprised. He had hoped that after the establishment of the Praja Sabha the people of the State would abandon their struggle but he found that the people were more turbulent than before.

In the same year, the Conference sent another memorial to the Maharaja demanding 'responsible government' but as was expected, the Maharaja refused to consider this request. The Muslim Conference then called on the people to observe a 'responsible government day'. The day was observed but very few non-Muslims participated. Sheikh Abdullah therefore decided to seek non-Muslim support. He appealed to the non-Muslims to join hands with the Muslim Conference to fight against the autocracy of the Maharaja and remarked that the

104 All India State People's Conference, *op. cit.*, p. 12.

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Muslim Conference was a 'part for every community'.[105] Unfortunately this suggestion was represented by the Hindus and the other non-Muslim communities as "a clever move to deceive the minorities".[106] However, this accusation did not deter Sheikh Abdullah and he kept on striving for unity among all communities. Sheikh Abdullah was changing from communalist to nationalist and this change in Sheikh Abdullah was destined to have very strong effect on the movement in the State which followed. In 1938, Sheikh Abdullah met Pandit Jawahar Lal Nehru and accompanied him on his Frontier Tour. He sought Pandit Nehru's guidance but the Congress Party had declared that it was not going to interfere in the struggle in the Indian Princely States. Panditji approved of Sheikh Abdullah's policy of seeking non-Muslim support and advised Sheikh Abdullah to persevere with the struggle. Sheikh Abdullah's belief in nationalism was now growing stronger,[107] and he now started the process of gradual intercommunalisation.

The formation of the Muslim Conference in the State of Jammu and Kashmir was particularly gratifying to the oppressed Kashmiri Muslims. Not that the people approved of or even understood the policies of the Conference, but they found in this organisation a hope of release from their bondage. The average villager was little concerned with the policies of the Conference and scarcely interested in the politics, but he was prepared to support any party or individual opposed to the autocracy of the Ruler. This attitude might have been due to lack of education but it was not confined to the State alone. It was commonly observed at the time in the sub-Continent and also in Burma and Indo-China.

Though the people were not officially members of the Conference, they supported it. From small beginnings it grew and spread throughout the State, carrying the message of freedom to people in the remotest villages. From these masses it gained strength and developed into a living and vibrant symbol of Kashmir's will to freedom and independence.

105 *Ibid.*, p. 13.
106 *Ibid.*, p. 14.
107 *Ibid.*, p. 19.

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The individual who led the party, rather than the party, was the person to whom the masses looked. In the beginning the people regarded the Muslim Conference as 'Sheikh Abdullah's party' and it was this personal ascendancy which inspired Sheikh Abdullah to seek the help of the other communities. As we shall see in the next chapter, when Sheikh Abdullah moved the resolution to convert the Muslim Conference into the National Conference, there was very little resistance in the Executive and no protest from the public.

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3

Kashmiris Demand A Constitution

(1) RISE OF NATIONALISM

On 28th June, 1938, a meeting of the Working Committee of the Muslim Conference was held in which Sheikh Mohammed Abdullah moved a resolution suggesting to change the name of the Conference to 'National Conference' and to amend the Constitution so as to 'throw its doors open' to non-Muslims. The resolution was passed by a majority of 17 against 3 votes.[1] This change in the name and the Constitution of the Muslim Conference now enabled the Hindus and Sikhs to join in the national struggle.

The National Conference decided to observe August 5, 1938, as the 'Responsible Government Day'.[2] The day was observed all over the country and meetings were attended by a very large number of people of all communities. The meetings passed the following resolution:

> "This mass meeting of the people places on record its complete repudiation of the present system of Irresponsible Government and wishes to express its faith in the establish-

1 All India State People's Conference, *Kashmir*, Bombay, 1939, p. 19.
2 *Ibid.*, p. 21.

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ment of complete Responsible Government, which alone can cure the ills of the people."[3]

These meetings alarmed the Maharaja. He realised that the people of his State were now united and that he could no longer suppress the rising public feeling. He thought it best to give some further constitutional guarantees.

On February 11, 1939, His Highness the Maharaja Bahadur issued a Proclamation sanctioning further Constitutional advance.[4] The main features of this Proclamation were:

(1) The number of elected members in the Praja Sabha was increased to 40 from 33. Thus, it provided for an elected majority in the Praja Sabha, where previously there had been an official majority.

(2) The Sabha was to be given the power to elect, from its non-official members, a Deputy President.

(3) The appointment of the non-official members as Under Secretaries would be made on the recommendations of the Praja Sabha. This was to ensure a closer association between the Government on the one hand and the members of the Praja Sabha and the constituencies on the other.

(4) The Praja Sabha was granted the right to vote (with exceptions of certain non-votable items, like His Highness's Privy Purse etc.) on the demands made by Government for Budget appropriations. This definitely was an important step in the constitutional history of Kashmir. But the seven seats in the Praja Sabha, which were thrown open to election, in reality only increased the representation of vested interests. These seven members were to be elected by *Tazimi Sardars* (Chief Landholders), *Jagirdars* (Estate owners), Small Landholders and Pensioners of the State.[5] Although a

3 As reproduced, *Ibid.*, p. 22.

4 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State*, 1947, 3rd Edition, p. 35.

5 Government of India, *Elections in Kashmir*, 1957, p. 3.

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progress, these constitutional provisions could by no means be regarded as intended to create a democratic system of government.[6] The leaders of the National Conference were not satisfied with such reforms. Their demands were:

"(a) The present system of administration in the State shall be replaced by Responsible Government, subject to the general control and residuary powers of His Highness the Maharaja Bahadur... .

(b) The Ministry shall be responsible to the Jammu and Kashmir Legislature... .

(c) The Legislature shall consist entirely of members elected by constituencies formed on the system of the adult franchise... .

(d) The religious rights and sentiments of all communities should always be respected and not interfered with."[7]

The Leaders of the Conference demanded a constitution which would fulfil all these demands. Being the only political party functioning in the State, the voice of the National Conference was bound to be heard and was in fact heard.

(2) THE JAMMU AND KASHMIR CONSTITUTION ACT, 1939[8]

The promulgation of the Jammu and Kashmir Constitution Act on September 7, 1939, by His Highness the Maharaja Bahadur was an event of outstanding importance in the annals of the State.

The Act consists of 78 Sections and 5 Schedules. It was promulgated by His Highness himself and was not framed by any Constituent Assembly elected by the people. The Preamble to the Act stated:

6 See Chapter 7, Section 4, p. 271 post also.
7 All India State People's Conference, *op. cit.*, pp. 37-38.
8 Act XIV of Samwat 1996 (A.D. 1939).

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"Whereas it is expedient to consolidate and amend the law relating to the Government of Jammu and Kashmir ; we are hereby pleased to enact as follows:"

The Preamble to a Constitution is intended to explain the scope of the Constitution. The Preamble to the Jammu and Kashmir Constitution Act clearly laid it down that the Act was a 'consolidation and amendment' of the law relating to the Government of Jammu and Kashmir. Although mainly it was a consolidating and amending Act, it also dealt with new provisions. Defining the powers of His Highness and his jurisdiction, the Act in Section 4 said:

"The territories for the time being vested in His Highness are governed by and in the name of His Highness, and all rights, authority and jurisdiction which appertain or are incidental to the Government of such territories are exercisable by His Highness, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Highness."

And Section 5 declared:

"Notwithstanding anything contained in this or any other Act, all powers, legislative, executive and judicial, in relation to the State and its Government are hereby declared to be and to have always been inherent in and possessed and retained by His Highness... ."

These sections were the most striking feature of the Act. These sections made His Highness the source of all authority both in theory and in practice.

"(Thus) there can be no doubt that though this Act (Act XIV of 1996) marked the second step taken by His Highness in actively associating his subjects with the administration of the State, *it did not constitute even a partial surrender by His*

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Highness of his sovereign rights in favour of the Praja Sabha."[9]

The Constitution Act emphatically brought out the fact that the Maharaja was an *absolute Monarch*[10] in whom were vested all the powers in relation to the State.

(a) Executive

Part II of the Act dealt with the Executive. Section 6 provided that, subject always to the provision regarding the inherent power of His Highness, the "suprintendence, direction and control of the civil administration and government of the State shall be vested in the Council".

The Council was to consist of the Prime Minister and "such other Ministers as His Highness may appoint by Royal Warrant of appointment. The Prime Minister was to be the President of the Council and the Prime Minister and the other Ministers shall be responsible to His Highness and shall hold office during the pleasure of His Highness."[11]

The legislature was not given any right to choose the Ministers. And since the Ministers were responsible to His Highness and not the Praja Sabha, it is reasonable to suppose that the Council was more concerned with gaining the favour of His Highness than to do any real good for the State. The ministers were not worried about reactions to their official acts in constituencies because "the members of the Council shall be ex-officio members of the Praja Sabha,"[12] and that was another way of reducing the powers of the Praja Sabha and adding to the Maharaja's already extensive powers. If the Praja Sabha was dissatisfied with the Council of Ministers, it could do nothing. A no-confidence motion, even if voted[13] by the Praja Sabha,

9 *Prem Nath Kaul* v. *The State of Jammu and Kashmir*, [A.I.R. (1952) S.C. 749], (Emphasis mine).

10 *Rehman Shagoo* v. *The State of Jammu and Kashmir*, [A.I.R. (1960) S.C. 1].

11 *The Jammu and Kashmir Constitution Act*, *1939*, Section 7.

12 *Ibid.*, Section 14 (2).

13 Under Section 35 His Highness could stop the discussion of the resolution in the Praja Sabha.

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would be useless as the Council was not responsible to the Praja Sabha but to His Highness. The Council of Ministers used to carry out the orders of His Highness and had the power to make rules for the following matters among others:

> "(a) the term of office of the nominated members of the Praja Sabha and the manner of filling casual vacancies among them;
> (b) the conditions under which and the manner in which persons may be nominated as members of the Praja Sabha;
> (c) the qualifications for being or being chosen as members of the Praja Sabha;
> (d) the final decision of doubts and disputes as to the validity of an election;
> (e) regulating the course of business and the preservation of order in the Praja Sabha;
> (f) prohibiting or regulating the asking of questions on and discussion of any subject specified in the rules;
> (g) the duties of the Advocate-General."[14]

With so wide powers given to His Highness's nominees, the Council of Ministers, it is difficult to see how the Praja Sabha could effectively control the administration of the State.

Since the Council was not chosen from among the elected members of the Praja Sabha, there was no fixed term of their office; they could remain in office for as long as His Highness desired.

These provisions give the impression that the legislature was subservient to the Executive, but we must keep in mind the fact that this was going to be the first legislature in the State under the new Constitution and it was necessary to entrust to the Council of Ministers, the members of which were more knowledgeable than the ordinary legislators, the making of the first rules on most of the matters referred to above. Even in the

14 *The Jammu and Kashmir Constitution Act, 1939*, Section 12.

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post-independent India Parliament has no power or control over these matters.

Section 10 of the Act provided for the appointment of an Advocate General of the State to tender advice on legal matters and to perform such other duties of a legal character as might from time to time be referred to him or assigned to him by the Council. He was appointed by His Highness on such terms and conditions as His Highness fixed. The power to appoint presumably includes power to dismiss. The Act did not lay down any qualifications for the appointment of the Advocate General, so the choice of His Highness would be absolutely discretionary. The Advocate General was given the right to speak or otherwise take part in the proceedings of the Praja Sabha, but could not vote, merely by virtue of his position as Advocate General.[15]

All orders of the Government were to be authenticated and issued in the name of His Highness and once so authenticated, their validity could not be called in question on the ground that it was not an order or instrument executed by His Highness or the Council as the case might be.[16]

(b) Legislature

Part III of the Act dealt with the legislature in the State. It provided for a unicameral legislature consisting of His Highness and the Praja Sabha.[17] The Praja Sabha consisted of a President and 75 other members.[18] Out of these 75 members, 40 were elected by the constituencies and 35, including the ex-officio members, who were not to exceed 8,[19] were nominated by His Highness.[20]

Section 15 of the Act dealt with the term of the Praja Sabha and provided that the Praja Sabha should continue for three

15 *The Jammu and Kashmir Constitution Act, 1939*, Section 18.
16 *Ibid.*, Section 11.
17 *Ibid.*, Section 13.
18 *Ibid.*, Section 14 (1).
19 *Ibid.*, Section 14 (5) (b).
20 *Ibid.*, Section 14 (3).

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years from its first meeting.[21] This date presumably referred to the "date of commencement of the first session".[22] However, His Highness could dissolve the Praja Sabha before the expiry of the term[23] and he could also extend the term of the Praja Sabha if in special circumstances he thought fit.[24] Apparently he would be the sole judge of the special circumstances and his decision that special circumstances existed would be conclusive.[25] The period between the expiry of one session and the beginning of the next session was not to exceed six months[26] and so there were to be at least two sessions of the Praja Sabha in a year. His Highness could summon the Praja Sabha at such time and place as he thought fit, he could prorogue or dissolve the Praja Sabha.[27]

(*i*) *Powers of the Praja Sabha*

The Praja Sabha could make laws for the whole State or any part thereof,[28] but this was not an absolute power. The Act provided that it was not lawful for the Praja Sabha to consider or deal with any matter or enact any law relating to or affecting:

> "(a) His Highness or any member of the Royal family or the management of the Royal household;
> (b) relations, treaties, conventions or agreements between the State and His Majesty the King Emperor of India or with Foreign Powers or the Government of any State in India now subsisting or in force or hereafter to be established or made;
> (c) matters of Frontier policy including those relating to Ladakh and Gilgit;

21 *The Jammu and Kashmir Constitution Act, 1939*, Section 15 (1).
22 *Saradhakar* v. *Orissa Legislative Assembly*, [A.I.R. (1952) Orissa 234].
23 *Jammu and Kashmir Constitution Act, 1939*, Section 15 (1) (a).
24 *Ibid*, Section 15 (1) (b).
25 See e.g. *Basant Chandra* v. *Emperor*, [A.I.R. (1944) F.C. 86].
26 *Jammu and Kashmir Constitution Act, 1939*, Section 15 (2).
27 *Jammu and Kashmir Constitution Act, 1939*, Section 15 (3) (b).
28 *Ibid.*, Section 23.

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(d) such matters relating to the Jagirs of Poonch and Chenani as His Highness may specify;
(e) rights specifically granted to Illaqadars or Jagirdars by their sanads;
(f) the organisation, discipline and control of the State forces;
(g) the departments declared by His Highness from time to time to be Hazur departments;
(h) the Dharamarth Trust;
(i) the provisions of this Act and the rules made thereunder and their repeal or modifications; and
(j) such other matters as may be specified by His Highness from time to time."[29]

These reserved matters covered a very wide field and if the entry in clause (j) i.e. "such other matters as may be specified by His Highness from time to time" is not construed *ejusdem generis* then the powers of the legislature would be subject to unanticipated restrictions which might make the legislature completely impotent. Apart from these reserved matters:

> "...no question shall be asked and no resolution shall be moved which affects the religious rights, usages, endowments or personal law of any community is not asked or moved by a member of that community."[30]

This was the incorporation of the recommendations of the Glancy Commission,[31] that no interference in the religion of any community should be allowed but, by providing that a member could move a resolution or ask any question pertaining to his own community, the Act in a way gave statutory recognition to 'communal discrimination' in the State. The Clause seems unwarranted in view of the fact that, at the time when this Act was promulgated, there were in force different Acts affecting

29 *The Jammu and Kashmir Constitution Act, 1939*, Section 24.
30 *Jammu and Kashmir Constitution Act, 1939*, Section 32, proviso.
31 See Ch. 2, p. 35 ante.

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the different communities in the State.[32]

After a Bill was passed by the Praja Sabha, it was submitted to the Prime Minister, who presented it to His Highness for the latter's assent;[33] assent was necessary to its validity.[34] But where a Bill had been passed by the Praja Sabha and submitted to the Prime Minister, the latter was not bound to submit it to His Highness for assent. He might "instead of presenting it for the assent of His Highness, return it to the Praja Sabha for consideration in whole or in part, together with any amendments which he might recommend".[35] Further Section 34 provided:

> "Where the Praja Sabha refuses leave to introduce, or fails to pass in a form recommended by the Council, any Bill, His Highness may declare that the proposed legislation is essential for the good government, safety or tranquillity of the State and such Bill shall, on such declaration, become an Act as if it had been passed by the Praja Sabha and assented to by His Highness."

And thus we find that the powers of the Praja Sabha had been curtailed still further, its position could well be compared to an operation theatre without any surgical appliances. To castrate the Praja Sabha, the Prime Minister was empowered to forbid the discussion of a particular resolution or the introduction of a Bill in the legislature and effect had to be given to the directions of the Prime Minister.[36] Moreover, under Section 38, His Highness had the power to issue Ordinances in case of emergency or where immediate legislation was required and under Section 39 "it shall not be lawful for the Praja Sabha to repeal or alter any ordinance passed under Section 38". So the only good this

32 e.g. (i) *Hindu Disposition of Property Act*, Act XVI of 1997 (1940 A.D.).
(ii) *Muslim Dowar Act*, Act XLIV of 1977 (1920 A.D.).
(iii) *Hindu Widow Re-marriage and Property Act*, Act XXIX of 1989 (1932 A.D.).

33 *Jammu and Kashmir Constitution Act, 1939*, Section 31 (2).

34 *Ibid.*, Section 31 (3).

35 *Jammu and Kashmir Constitution Act, 1939*, Section 31 (1).

36 *Ibid.*, Sction 35.

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legislature could do was to train future legislators. But although the Praja Sabha was a rudimentary legislature at this stage, it contained the promise of further development. The mere establishment of this Assembly challenged the autocratic and patriarchal system. We must concede that in 1940's the mere admission of the shadow of democracy in a Native State was a concession full of promise. The Praja Sabha for some time remained just a consultative body, but even as such, it could exercise some influence. It was bound to operate towards deterring the ruler from pursuing arbitrary or unconstitutional methods in any direction.

(ii) Disqualification for membership of the Praja Sabha

The Constitutional Act dealt with the qualifications for membership of the Praja Sabha in a negative manner—by providing the disqualifications for membership. It provided that a person should be disqualified for being chosen as or for being a member of the Praja Sabha on the following grounds:

> "(a) if he is an official, but this shall not apply to the ex-officio members, or to the officials nominated by His Highness, or to the President, or to the Deputy President, or to the under secretaries elected by the Praja Sabha;
> (b) if he is under 25 years of age;
> (c) if he is of unsound mind and stands so declared by a competent court;
> (d) if he is an undischarged insolvent or being a discharged insolvent has not obtained from a competent court a certificate that his insolvency was caused by misfortune without any misconduct on his part;
> (e) if he is a person against whom a conviction by a Criminal Court for an offence punishable with a sentence of imprisonment for a term of six months or more is subsisting or order binding him to be of good behaviour has been passed or an order of internment passed by a magistrate or the Council

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of His Highness is in force, unless a period of five years or such less period as His Highness may allow in any particular case has elapsed since his release or the expiry of the period specified in the order;

(f) if he has been convicted or has in proceedings for questioning the validity or regularity of an election, been found guilty of any offence or corrupt or illegal practice relating to elections, which has been declared by any rule or order of the Council to be a practice entailing disqualification for membership of the Praja Sabha, unless a period of three years has expired from the date of such conviction or finding;

(g) if, having been elected a member of the Praja Sabha, he has failed to lodge a return of election expenses within the time and in the manner required by the rules under this Act, unless a period of three years has expired from the date by which the return ought to have been lodged or His Highness has removed the disqualification.''[37]

A person could not be chosen a member of the Praja Sabha while serving a sentence of imprisonment for a criminal offence or while under detention for failure to furnish security for keeping the peace or for good behaviour.[38] Disqualifications other than those mentioned in the Act could be imposed by law.

The members of the Praja Sabha were given freedom of speech 'and no member shall be liable to any proceeding in any court in respect of anything said or any vote given by him in the Praja Sabha or any committee thereof, and no person shall be liable in respect of the publication by or under the authority of the Praja Sabha of any report, paper, votes or proceedings.[39] This enabled the members of the Praja Sabha to cri-

37 *Jammu and Kashmir Constitution Act, 1939*, Section 28 (1).
38 *Ibid.*, Section 28 (2).
39 *Ibid.*, Section 29.

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ticize every such act of the government which it thought was arbitrary or unconstitutional without any fear of punishment. Since in most of the native states "as speech has been denied to the dumb animal, so is all articulate expression of feelings and opinion denied to the people".[40] This immunity granted to members of the Praja Sabha amounted to an advance from the position in most Indian princely states.

(*iii*) *Procedure in Financial Matters*

The Budget or the "Annual Financial Statement", laid before the Praja Sabha at the instance of the Council of Ministers,[41] was in two parts. The first part showed (a) the sums required to meet expenditure described by this Act as expenditure charged upon the revenues of the State, and (b) "the sums required to meet other expenditure proposed to be met from the revenues of the State".[42] The following were charged on the revenues of the State:

(a) expenditure on matters reserved for cognizance of the Praja Sabha under section 24,[43]
(b) contributions payable to other governments,
(c) expenditure obligatory under any law,
(d) interest on loan and sinking fund charges,
(e) expenditure which may be classed by His Highness or the Council as political,
(f) pensions and gratuities granted by His Highness or with his sanction or under the rules sanctioned by His Highness or the Council,
(g) contributions, grants and scholarships sanctioned by His Highness,
(h) salaries of the judges of the High Court and of

40 Chudgar, P.L., *Indian Princes under British Protection*, London, 1929, p. 65.
41 *The Jammu and Kashmir Constitution Act, 1939*, Section 41.
42 *Ibid.*, Section 42.
43 See p. 50. ante.

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the Members of His Highness's Board of Judicial Advisers,

(i) salaries of such officers as His Highness may specify from time to time,

(j) such other expenditure as His Highness may specify from time to time.[41]

This part of the Budget, though open to discussion in the Praja Sabha, was not subject to vote.[45]

The second part of the Annual Financial Statement contained demands for grants to meet anticipated expenditure ;[46] these might be assented to, refused or reduced by the Praja Sabha[47] but the "Council shall have power, in relation to any such demand, to act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein specified, if the Council considers that the expenditure provided for by the demand is necessary for the carrying on of any department or for the discharge of the Council's responsibility for its administration" ;[48] and furtner "His Highness might in cases of emergency authorise such expenditure as might in his opinion be necessary for the safety or tranquillity of the State or any part thereof or for the carrying on of any department".[49] Demands were made at the recommendations of the Council of Ministers.[50] The decision of the Prime Minister that any proposed expenditure fell within a class of expenditure charged on the revenues of the State was conclusive, when the Bill was presented to His Highness for assent or transmitted to the Praja Sabha for discussion.[51] Substantially, the same provisions applied to Acts passed to provide for supplementary grants during the year.[52] In any case "A Bill which, if enacted and brought into operation, would involve expenditure from

44 *The Jammu and Kashmir Constitution Act, 1939*, Section 43.
45 *Ibid.*, Section 45 (1).
46 *The Jammu and Kashmir Constitution Act, 1939*, Section 45(2).
47 *Ibid.*, Section 45 (2).
48 Proviso (a) to *Ibid.*, Section 45.
49 *Ibid* , Proviso (b).
50 *Ibid* , Section 45 (3).
51 *Ibid* , Section 44.
52 *Ibid.*, Section 46.

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the revenues of the State shall not be passed by the Praja Sabha unless the Council has recommended to the Praja Sabha the consideration of the Bill".[53]

The revenues of the State were to be received for and in the name of His Highness.[54] Revenues in this context included:

(a) public moneys raised or received by the State ;
(b) all fines and penalties incurred by the sentence or order of any Court of Justice in the State, and all forfeiture of any movable or immovable property in the State for crimes;
(c) all movable or immovable property in the State escheating or lapsing for want of an heir or successor and all property in the State devolving as *bona vacantia* for want of a rightful owner.

And so there was no difference made between the private income of His Highness and the revenues of the State. Although this was most unfair, yet, in most of the Indian Native States no distinction whatsoever was made between the revenues of the State and the private income of the Ruler.[55]

(c) The Judiciary

Part IV of the Jummu and Kashmir Constitution Act, 1939, dealt with the judiciary in the State.

Under the Act, the High Court, which was established by His Highness in 1928,[56] continued to be the High Court for the State.[57] It consisted of a Chief Justice and two or more other judges as His Highness may from time to time think fit to appoint.[58] The Act did not lay down any maximum number but provided that the minimum number of judges at any time would be three,

53 *The Jammu and Kashmir Constitution Act, 1939*, Section 47 (3).
54 *Ibid.*, Section 73.
55 See p. 65-66 post.
56 By Order No. 1 of Samwat 1985 (A.D. 1928, March).
57 *The Jammu and Kashmir Constitution Act, 1939*, Section 48 (a).
58 *Ibid* , Section 48 (b).

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including the Chief Justice. However, failure to fill up a vacancy would not affect the jurisdiction of the Court.[59]

The power to appoint the judges was vested in His Highness,[60] and unless His Highness otherwise directed, the judges were to hold office until they attained the age of fifty-five years. It was required that a candidate for appointment as a judge of the High Court should have been for at least ten years a Barrister of England or Ireland or a member of the Faculty of Advocates in Scotland or should have held judicial office in the State of a rank not inferior to that of a district judge for a period of 5 years or held judicial office in the State or in British India, not inferior to that of a subordinate judge, or a judge of the small causes court for ten years or should have been an advocate of the High Court in the State or in British India for a period of not less than ten years.[61] A judge of the High Court could resign his office in writing under his hand addressed to the Prime Minister.[62] A judge could be removed from his office by order of His Highness on the ground of misbehaviour or of infirmity of mind or body.[63] This provision made the interference of the Executive in the Judiciary possible. Misbehaviour, not being defined in the Constitution Act, was left to His Highness's discretion so that it might embrace any act which displeased His Highness. But in Princely India, the ruler's power to remove the judges was unconfined too. In the "great majority of (Indian Princely) States executive and judicial functions are not separated".[64]

The legislature, however, had no control in the judiciary. Section 37 provides:

> "No discussion shall be allowed in the Praja Sabha with regard to the conduct of any member of His Highness's Board of Judicial Advisers or of any Judge of the High Court in the discharge of his duties."

59 *Sampatlal* v. *Baliprasad* (1949) 54 C.W.N. 92.
60 *The Jammu and Kashmir Constitution Act, 1939*, Section 49.
61 *The Jammu and Kashmir Constitution Act, 1939*, Section 51.
62 *Ibid.*, Section 49 (a).
63 *Ibid.*, Section 49 (b).
64 Keith, A.B., *A Constitutional History of India (1600-1935)*, p. 444.

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The object of this provision was to secure the independence of the judges from the legislature. It is substantially reproduced in Article 121, Indian Constitution and Section 88 of the Constitution of Jammu and Kashmir, 1957. If, in the discharge of his duties, a judge came to an erroneous decision or abused his power or position, the only course open to the legislature was to appeal to His Highness to remove the judge.[65] All writs, summons, precepts, rules, orders and other mandatory processes to be used by the High Court issued in the name of His Highness and were sealed with the seal of the High Court.[66] The seal of the High Court bore a device and impression of the Jammu and Kashmir Coat of Arms with an exergue or label surrounding the same, with the following inscription, "The Seal of the High Court of Judicature, Jammu and Kashmir". The seal was to be kept in the custody of the Chief Justice or of an officer of the Court from time to time nominated by the Chief Justice.[67] Invariably this person was the Registrar or Deputy Registrar.

(i) Jurisdiction of the High Court [68]

Section 56 of the Act dealt with the jurisdiction of the High Court and provided:

"(1) The High Court is a Court of record ; [69]

65 In 1949, there were comments on the judicial findings of the Judges of the Supreme Court of Seychelles in the House of Commons. In reply to a question in the House of Lords, the Lord Chanceller said that the judges of the Supreme Court were independent and their findings could not be commented upon in the Legislature. *See* 1949, 165 H.L. Debates, 19-20.

66 *Ibid.*, Section 55.

67 *Ibid.*, Section 54.

68 According to the *Criminal Procedure Code*, 1989. (*A.D. 1932*), the 'High Court' means the highest Court of Criminal appeal and revision in the Jammu and Kashmir State. [Section 4 (1) (f)].

According to the *Civil Courts Act, 1977* (*A.D. 1920*), the High Court shall be deemed for the purposes of all enactments for the time being in force to be the highest Civil Court of appeal or revision. (Section 4).

69 For discussion on '*a court of record*,' see [Chapter 8, [pp. 321-323 below.

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(2) The High Court shall have jurisdiction to hear and determine any original civil suit or other proceeding of which the value is not less than rupees ten thousand and every such proceeding shall be instituted in the High Court ;

(3) The High Court shall have jurisdiction to entertain and dispose of such appeals, revisions and other cases—civil, criminal or revenue—as it may be empowered to do under any enactment in force in the State."

The High Court had jurisdiction to entertain a civil suit of value of Rupees Ten thousand or over and to dispose of such appeals, revisions and other cases as it was empowered to hear under any enactment in force in the State. Appeals from the lower courts lay to the High Court and Section 60 provided:

"(2) ...an appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force passed or made by a single Judge of the High Court shall lie to a bench consisting of two other judges of the High Court ;

(3) unless such an appeal is prohibited by any enactment for the time being in force, an appeal from an appellate decree made by a single judge of the High Court shall lie to a Bench consisting of two other judges of the High Court, where the Judge who passed the decree declares that the case is a fit one for appeal."

However, the High Court was not the final interpreter of the Constitution. Section 75 provided:

"If any dispute arises as to the interpretation or carrying out of any of the provisions of this Act or the rules made thereunder, the decision of the Council, subject to the provisions of Section 5 (relating to the inherent powers of His Highness), shall be final."

Differing from other Indian States, in Kashmir the Council of Ministers was the custodian and guardian of the Constitution.

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However, His Highness could, by virtue of the inherent powers vested in him under Section 5, overrule the decision of the Council of Ministers.

The Chief Justice could determine which Judge should sit alone and which of the two judges of the High Court should constitute a Bench.[70] In the case of a difference of opinion among the Judges of the High Court comprising any bench, the decision would be in accordance with the majority opinion.[71] But if there was no such majority, then the decision would be "in accordance with the decision of the Senior Judge".[72]

This provision provokes comment. The word 'Senior Judge' was not defined in the Act and even the Interpretation Act[73] is silent on the point. According to Section 50 (1) "the Chief Justice shall have rank and precedence before the other Judges," which seems to imply that the most senior judge would be the Chief Justice. In actual practice there were only three judges in the High Court of Jammu and Kashmir, including the Chief Justice. A division bench consisted of two judges and a full bench of three. In a full bench, there would always be a majority decision since there are three judges and in "other cases, the bench before which the difference has arisen shall either refer the question or the whole case for decision to a full bench". This would seem to make the provision regarding the 'Senior Judge's decision prevailing' inoperative. However, if a situation arose in a division bench comprising of two judges then either the case would be referred to a full bench or else the opinion of the senior judge would prevail since Section 50 (2) provides "all the other judges shall have rank and precedence according to the seniority of their appointment". The only possibility of the situation contemplated by Section 62(2) (a) arising would seem to be a sudden vacancy in a full bench of three judges. In such a case, the opinion of the present writer is, that the opinion of the senior judge would

70 *Jammu and Kashmir Constitution Act, 1939*, Section 61.
71 *Ibid.*, Section 62 (1).
72 *Ibid.*, Section 62 (2) (a).
73 *The General Clauses Act* (Act XX of 1977) (A.D. 1920).

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have prevailed. So far as is known in no reported case did this difficulty arise.

(*ii*) *His Highness's Board of Judicial Advisers*

Akin to the Privy Council in relation to British India, His Highness appointed a Board of Judicial Advisers to advise him for the disposal of such civil and criminal appeals as, under the law for the time being in force, lay to him from the decision of the High Court, and on such other matters as His Highness chose to refer to the Board for advice.[74] The composition of the Board and the appointment of its members vested in His Highness. Although prescribed periods of experience at the bench or at the bar were required for appointment as a Judge of the High Court, the Act laid down no qualifications for being appointed a member of the Board. The matter was left completely to His Highness's discretion.[75] The procedure for filing these appeals was not laid down in the Constitution Act but in the *Appeals to His Highness's Act, 1996*.[76]

(*iii*) *Appeals to His Highness's Act, 1939*

Civil Cases: This act provided that appeals in Civil cases should lie to His Highness (a) from any decree or final order passed on appeal by the High Court, when the value of the subject matter of the suit in the court of first instance and in dispute on appeal to His Highness was five thousand rupees[77] or upwards and also when the decree or final order involved directly or indirectly,[78] some claim or question to, or respecting,

74 *The Jammu and Kashmir Constitution Act*, 1996, Section 71 (2).
75 *Ibid.*, Section 71 (2).
76 Act XVI of 1996 (A.D. 1939).
77 The material date in such a case is the date of the institution of the suit. See *Rajendra* v. *Rash Behari*, (1931) 35 C.W.N. 609. The Kashmir High Court has held that "in a suit for pre-emption of a house, forum of appeal is not determined by the value of property put in the plaint but by the price determined by the trial court". See *Mohd. Sadiq* v. *Jamal Soofi* [A.I.R. (1952) J. & K. 19. D.B.].
78 No clear cut answer can be given to the question whether any claim or

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property of like amount or value. No appeal lay when the decree or final order of the High Court affirmed the decision of the Court immediately below, unless the issue involved some substantial question of law.[79] "Law in this context would mean the general law and not merely the statute law."[80] Whoever desired to appeal to His Highness had to apply by petition to the High Court[81] within 90 days from the date of the decree or the final order of the High Court appealed from.[82] The High Court could refuse to grant a certificate that the case was fit for appeal to His Highness and the petition in such cases will be dismissed.[83] This seems harsh, because, if the High Court erroneously refunded a Certificate, there was no provision in the Act which would enable the aggrieved party to appeal by special leave to the Board of Judicial Advisers.

Where the High Court granted a Certificate, it declared the appeal admitted and transmitted the petition with its orders and the full record of the case in all courts to the Board of Judicial Advisers.[84] The Board would hear the appeal, record its opinion and submit the same to His Highness for final orders.[85] An order is "final" if it finally disposes of the rights of the parties.[86]

Criminal Cases: The Act made provision for appeals to His Highness from an order of the High Court in a criminal case in which a sentence of death or imprisonment for life was passed or upheld by the High Court and the case was certified by the High Court to be fit for appeal to His Highness.[87] The

question to property is 'directly or indirectly' involved in a suit, but the connection between the decree or order and the property must not be too remote. See *Udey Chand* v. *Guzdar*, (1925) 52 I.A. 207.

79 Act XVI of 1996 (A.D. 1939), Section 2 (a) Proviso (1).
80 *Ram Gopal* v. *Shamskhanton*, (1893) 19 I.A. 228.
81 Act XVI of 1996 (A.D. 1939), Section 3.
82 *Ibid.*, Section 16 (1).
83 Act XVI of 1996 (A.D. 1939), Section 6.
84 *Ibid.*, Section 7 (1).
85 *Ibid.*, Section 8.
86 *Ramchand* v. *Goverdhandas*, (1920) 47 I.A. 121.
87 Act XVI of 1996 (A.D. 1939), Section 10.

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procedure for filing the appeal was the same as that in a civil case. The convicted person applied by petition to the High Court, praying for a certificate that the case was fit for appeal to His Highness.[88] However, the time limit within which an appeal could be preferred to His Highness was, in a criminal case, ten days from the date of the order of the High Court appealed against,[89] whereas in civil cases it was 90 days.[90]

The High Court could dismiss the petition but its discretion was to be exercised on well established principles and not arbitrarily.[91] If the appeal was allowed the procedure was the same as in a civil case.[92] The final orders of His Highness were communicated to the High Court; it was the duty of the High Court and all subordinate Courts and all authorities in the State to carry out the orders of His Highness.[93]

Royal Prerogative: Section 72 of the Jammu and Kashmir Constitution Act, 1939, dealt with the Royal Prerogatives of His Highness. It provided:

> "Nothing herein contained and nothing contained in any other enactment for the time being in force, shall be deemed to affect in any way or derogate from the inherent powers and prerogative of His Highness or to affect in any way his prerogative of mercy and pardons, or his power of remitting, commuting or reducing sentences conditionally or otherwise."

This Section read with Section 5[94] emphasises the fact that His Highness was an absolute monarch and the repository of all powers with regard to the State and its subjects.

88 Act XVI of 1996 (A.D. 1939), Section 11.
89 *Ibid.*, Section 16 (2).
90 See p. 63 ante.
91 Nar Singh *v.* State of U.P. [A.I.R. (1954) S.C. 451].
92 See p. 63 ante.
93 Act XVI of 1996 (A.D. 1939), Section 17.
94 See p. 46.

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(iv) Epilogue

From the above discussion we find that the outstanding feature of the Act was the supremacy of the Maharaja. He was in law the source of all powers in regard to the State and the fountain of all essential attributes of sovereignty. His position could well be compared to that of the King in Parliament in Great Britain. He could make and unmake laws as he pleased and no person or body was recognised by any law in the State as having any right to overrule or supersede any piece of legislation enacted by him. On account of his absolute supremacy, no question of the constitutional validity of any act of his could be raised in any court of law. He was answerable neither in his own courts nor in the courts of British India. In the ultimate analysis there was one man's rule and the doctrine of supremacy of the legislature had no application in the State.

It would, however, be futile to criticise this Act and its promulgator by stressing shortcomings in comparison with the Constitution in force in Kashmir today and to comment on the Act from this standpoint would serve no useful purpose. The proper standard for comparison for constitutional advance in Jammu and Kashmir, it is submitted, must be the constitutional position prevailing in other Princely States in India. Even then it is not fair to compare the advance in Kashmir with that in the Princely States in South India, like Cochin,[95] which have always led the advance towards a democratic administration. The State of Cochin was the first State in India to separate the Judiciary from the Executive. As early as 1925, it had a Legislative Assembly with an elected majority.[96]

In Hyderabad a Legislative Assembly was set up in 1946 but the Muslim members had, by official orders, a majority of 10 over the Hindus in a House of 132, though the population was 85% Hindu.[97] The Nizam was the source of all authority in the State.

95 The rate of literacy in Kashmir was hardly 3% as compared to about 40% in states like Cochin.
96 Menon, V.P., *op. cit*, p. 276.
97 *Ibid.*, p. 317.

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Mysore had a Legislative Council with an elected majority from 1907; it had wide legislative and financial powers but no control over the executive government.[98]

The late Sir George Jivaji Rao Scindia of Gwalior only announced his intention of granting responsible government in December 1946, and in May 1947 he summoned an interim government of popular representatives as well as a Constitution-making body.[99]

In Jaipur, the first Legislative Assembly was established only in 1944.[100]

Hyderabad, Mysore and Baroda might be regarded as more progressive than many Indian Native States. In most States the sovereign's decree was law. In States like Baroda and Hyderabad there was a body of laws adapted from the statute book of British India.[101]

It must, therefore, be conceded that the Ruler of Kashmir at least attempted to associate his people with the administration. He had taken the first step and the first step towards advance in any field is usually the most difficult and important. Although the Praja Sabha's powers were limited and circumscribed by the princely prerogative yet, between 1934 and 1944, it passed many Bills, which received the assent of His Highness and became law. They covered a wide field and related *inter alia* to (a) widow remarriage,[102] (b) inheritance amongst Hindus,[103] (c) the suppression of immoral traffic in women,[104] (d) village panchayats,[105] (e) the defence of the State,[106]

98 Keith, A.B., *op. cit.*, p. 444.
99 Keith, A.B., *op. cit.*, p. 444.
100 *Keesing's Contemporary Archives* (1943-45), col. 6321.
101 Lee-Warner, Sir William, *The Native States of India*, London, 1910, p. 7.
102 Act XXIX of 1989 (A.D. 1932).
103 Act XVII of 1997 (A.D. 1940).
104 Act XI of 1991 (A.D. 1934).
105 Act I of 1992 (A.D. 1935).
106 Act XXI of 1996 (A.D. 1939).

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(f) income tax,[107] (g) sale of goods,[108] (h) land alienation,[109] (i) arms[110] and (j) census.[111]

The Constitutional reforms in Kashmir gave the people in Kashmir some opportunity to associate themselves with the administration of the State, but this was not what the people had asked for. They had asked for a representative government and an elected legislature; they were not satisfied with a puppet assembly and a council of ministers responsible only to His Highness. The time when the people could be hypnotised by such measures was past. The National Conference regarded the Constitution Act inadequate. In British India political conditions were changing with astounding speed. The leaders of the National Conference voiced their views once again.

In 1941, the National Conference became a formal member of the *All India State People's Conference*, with affiliations in most Princely States. Sheikh Abdullah was elected the President of the *All India States People's Conference* in 1946, and, thereafter he had close contacts with the Congress leaders in India, particularly with Nehru. This association between Sheikh Abdullah and Mr. Nehru strengthened the nationalistic policies of the National Conference in Kashmir and according to Brecher "the link of the National Conference to the Congress sharpened the political cleavage in Kashmir".[112] In 1941, the conservative Muslims in Kashmir, led by Ghulam Abbas, revived the Muslim Conference in Kashmir.[113] Both these political organisations, the Muslim Conference and the National Conference, intensified their campaigns. The authorities considered it highly necessary that the excited and enraged people should be pacified by giving them some hopes and promises of reform of the constitution and participation in the administration of the state before they got out of hand. The Maharaja accordingly instituted a commission of enquiry, under the president-

107 Acl IX of 1991 (A.D. 1934).
108 Act II of 1996 (A.D. 1939).
109 Act V of 1995 (A.D. 1938).
110 Act II of 1991 (A.D. 1934).
111 Act III of 1997 (A.D. 1940).
112 Brecher, Michael, *op. cit.*, p. 7.
113 Bazaz, P.N., *op. cit.*, p. 190.

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ship of Chief-Justice Sir Ganga Nath, on 14th July, 1943.[111] This Commission was called the Royal Commission and, in addition to twenty non-official members, had two members of the National Conference, Mirza Afzal Beg and Ghulam Mohammed Sadiq. Early in 1944, most of the members resigned from the Royal Commission and in October 1944, Sir Ganga Nath submitted his own report but the report was quietly shelved and never saw the light of day.[115] In January 1944, Sir Benegal Narsingh Rao, a statesman and a great judge from the Calcutta High Court who subsequently exercised considerable influence on the Indian and Burmese constitutions, was appointed the Prime Minister of Kashmir. He desired to make Kashmir a 'model State' and so he offered more press and platform freedom to the political parties in Kashmir.

The National Conference held its annual session on the 29th and 30th September, 1944, at Sopore in Kashmir. The delegates to the session unanimously approved a manifesto, 'New Kashmir', as the objective of the National Conference.

The "New Kashmir" Manifesto[116] was divided into two parts (i) The Constitution of the State and (ii) The National Economic plan. The part dealing with the Constitution of the State was further sub-divided into several sections including (a) citizenship, (b) the national assembly, (c) the ruler, (d) the council of ministers, (e) justice, (f) local administration and (g) the national language.

The section dealing with citizenship required that the people of Jammu and Kashmir State should be guaranteed:

1. Freedom of speech
2. Freedom of the press
3. Freedom of assembly and meetings
4. Freedom of street processions and demonstrations.[117]

114 *Keesing's Contemporary Archives* (1943-45), col. 6265A.

115 Information regarding the Royal Commission based on Bazaz, P.N., *op. cit.*, pp. 202-222.

116 Kashmir Bureau of Information, *New Kashmir*, New Delhi, Reprint, 1948.

117 Kashmir Bureau of Information, *New Kashmir*, New Delhi, *op. cit.*, Section 3.

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The Manifesto declared that "freedom of conscience and of worship shall be guaranteed for all citizens".[118] It further laid down that "no citizens may be arrested or detained except by decision of a Court of Law".[119] All citizens would have the right to work, that is, the right to receive guaranteed work and the right to rest.[120] All students were to have a right to receive education and scholarships were to be given to the deserving poor students.[121] Women citizens should be accorded equal rights with men in all fields of national life and the law should give special protection to the interests of mother and child.[122]

The manifesto also required that the highest legislature of the State, National Assembly, should be elected by citizens of the State by electoral districts on the basis of one deputy per 40,000 persons, for a period of five years.[123] The Council of Ministers of the State should be responsible to the National Assembly [124] Section 27 of the manifesto required the position of the Ruler to be reduced to that of the constitutional head.

The National Economic plan was sub-divided into (i) production, (ii) transport, (iii) distribution, (iv) utility services and (v) currency and finance. The object of this Plan was to provide a reasonable standard of living for all people in the State.

This manifesto was submitted to His Highness the Maharaja Bahadur for his consideration. The leaders of the National Conference made it clear to His Highness that this was the only plan which would be acceptable to the people of the State. Maharaja Sir Hari Singh now realised that he would have to give way to the public pressure for reforms in the State.

(3) FURTHER REFORMS IN KASHMIR

On October 2, 1944, was announced a well prepared plan of

118 *Ibid.*, Section 2.
119 *Ibid*, Section 5.
120 *Ibid.*, Sections 8 & 9.
121 *Ibid.*, Section 11.
122 *Ibid.*, Section 12.
123 *Ibid.*, Section 19.
124 *Ibid.*, Section 24.

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dyarchy in the Praja Sabha by the President of the Sabha:

> "With a view to give further effect to my policy of associating my subjects with the administration of the State, I (Maharaja Hari Singh) have after careful consideration decided to call upon the Praja Sabha to nominate a panel of six (three to be Muslims) of its members, three from Jammu and three from Kashmir (including the Frontier district). The Assembly will determine its own procedure for nominating the panel, official members taking no part in the proceedings. Out of the panel so nominated, I shall appoint two (one of whom will be a Muslim) as my Ministers. These Ministers shall hold charge of Portfolios to be determined by me. They will draw the usual salary of Ministers, unless the Praja Sabha desires to vary it, in which case the Sabha may submit its recommendations on to me through the usual channels. The Ministers so appointed by me will hold office during my pleasure or for two years, after which if they still continue to be members of the Sabha, they will be eligible for re-appointment."[125]

Pursuant to this announcement of the Maharaja Bahadur, the non-official members of the Praja Sabha elected a panel of six members. Out of these six, His Highness appointed Mirza Afzal Beg and Captain Wazir Ganga Ram, two 'popular' ministers. The salary of each was fixed at Rs. 1,600/- (about £120 sterling) per mensem, as proposed by the Praja Sabha.[126]

The appointment of the 'popular' ministers, as Mirza Afzal Beg and Wazir Ganga Ram were on selection by the Praja Sabha, was not welcomed by all sections of the public. Since Mirza Afzal Beg was a member and nominee of the National Conference, the leaders of the Muslim Conference were not pleased about the selection of these 'popular' ministers. Openly

125 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir*, 3rd Edition, 1947, p. 37.
126 *Ibid.*, p. 40.

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the Muslim Conference leaders did not protest.[127]

Both the National Conference and the Muslim Conference actively participated in the Legislature till 1946. But now, as Brecher observes, "their energies were constantly being diverted from the mutually-agreed upon objective of responsible government to an interparty ideological conflict, to the disadvantage of the two parties and the exclusive benefit of the ruling dynasty".[128] This conflict between the two political parties was to have a very serious and far-reaching consequence in Kashmir.[129]

127 Government of Jammu and Kashmir, *Report on the Administration for 1945*, Srinagar, 1946.

128 Brecher, Michael, *op. cit.*, p. 13.

129 See Chapter 4, p. 82 post.

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4

Kashmir and Indian Independence

(1) KASHMIR ON THE EVE OF INDIAN INDEPENDENCE

Pursuant to his announcement on 2nd October, 1944, His Highness the Maharaja of Kashmir, "with a view to give further effect to my policy of associating my subjects with the administration of the State"[1] for the *first time* appointed Mirza Mohammed Afzal Beg the nominee of the National Conference, one of the two 'popular ministers' in the State cabinet. The second 'popular minister' was Wazir Ganga Ram,[2] a member of the Maharaja's own community. But the hollowness of his 'desire to associate the subjects with the administration of the State' was soon exposed. In 1946, on the eve of the British Cabinet Mission's visit to India, Beg resigned from the cabinet. The reason, as explained by the National Conference was that the Prime Minister of Kashmir, who was still a nominee of the Maharaja, had refused to honour the agreement whereby the popular ministers would be permitted to dissent publicly from

[1] Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State*, Jammu, 1947, p. 37.
[2] *Ibid.*, p. 40.

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Government policy in the Legislature.[3] This resignation was the beginning of a struggle which made His Highness quit the state. Sheikh Abdullah, leader of the National Conference then threw a challenge to the very basis of the Dogra sovereignty in Kashmir: "In his speeches delivered to crowds Abdullah stressed two points. First that the Treaty of Amritsar between the British and Raja Gulab Singh was a sale-deed unacceptable to the people of Kashmir and should be abrogated. Second that Maharaja Hari Singh should quit the valley bag and baggage and leave Kashmiris alone to decide their future by themselves."[4] And with this, was initiated the 'Quit Kashmir' movement of the National Conference in Jammu and Kashmir State, in imitation to the Congress's 'Quit India' movement in British India.

The Maharaja's Government was prepared to meet any such situation. The Prime Minister of Kashmir told the correspondent of the *Hindustan Times*, "we have been preparing for it for 11 months and now we are ready to meet the challenge... . We shall be ruthlessly firm and we make no apology about it".[5] True to the very words of the Prime Minister, the Government started repressive measures and on May 20, 1946, Sheikh Mohammed Abdullah along with other prominent leaders of the National Conference was arrested. A case of sedition was instituted against him and the prosecution stated:

> "(1) That the accused with the object and intention of bringing into hatred and contempt His Highness the Maharaja Bahadur and the Government of Jammu and Kashmir as established by law and with a view to exciting disaffection towards His Highness the Maharaja Bahadur and the Government of Jammu and Kashmir as established by law convened public meetings of the National Conference in different parts of Srinagar City and its suburbs on 9th, 10th, 13th, 14th,

3 National Conference, *Farce of Dyarchy—Full story of M.A. Beg's Resignation*, Srinagar, 1946, p. 2.

4 Bazaz, P.N., *History of Struggle for Freedom in Kashmir*, New Delhi, 1954, p. 256.

5 *Hindustan Times*, Delhi, May 27, 1946.

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and 16th of May, 1946 (and on many other places as well) in which he addressed the assembled people."[6]

Abdullah pleaded 'not guilty' and gave a lengthy statement in which he admitted having demanded a "responsible government". His defence was conducted by a famous Congress leader and a barrister of oustanding abilities, Mr. Asaf Ali. Mr. Ali argued, "the main question in this case is whether it is the right of a people to demand responsible Government even in emphatic terms if necessary". He said it was. He then went on to ask, "Is it a crime to say that the basis of the Government of this State should be the Will of the people and not a treaty which is 100 years old and which is impugnable in the highest international court of Justice?"[7] Nonetheless, the trying judge found Sheikh Abdullah guilty and sentenced him to three years simple imprisonment on each of the three counts with a fine of rupees five hundred on each score. The sentences were to run concurrently.[8]

Sheikh Abdullah's arrest and trial caused a great stir in the public both in India and in Kashmir. In Kashmir the Maharaja's Government was 'ruthlessly firm'. Pandit Nehru, who was at this time one of the acknowledged leaders of the Congress and the 'would-be Prime Minister' of free India, tried to come to Kashmir on June 18, 1947. He was not allowed to enter the State by the Orders of the Maharaja. At *Kohala* he was told by a magistrate of the Maharaja's Government, that his entry in Kashmir had been banned by the Government of Jammu and Kashmir. The magistrate advised Nehru to go back to British India but Nehru refused to take the advice and proceeded. At *Domel* he was arrested and kept in detention for two days.[9] Thus, "the Maharaja was still in a position, as late as 1946, to exert his sovereign authority in any

6 *State* v. *Sheikh Mohammed Abdullah*, Criminal Case No. 1 (A) of 2003. (As published by National Conference, *Why freedom*?, 1946, p. 3.
7 *Ibid.*, p. 15.
8 *Ibid.*, p. 18.
9 Azad, Maulana Abul Kalam, *India wins freedom*, pp. 148-149.

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manner if he so desired".[10] Sheikh Abdullah's trial and the National Conference's 'Quit Kashmir' movement had one dramatic side too. The Muslim Conference, which was strongly opposed to the ideology of the National Conference but had hitherto been criticizing the Maharaja's Government quite severely, took this opportunity to gain the platform and take revenge on the National Conference. In July 1946, Ghulam Abbas, the President of the Muslim Conference described the 'Quit Kashmir' movement as a 'counsel of despair'.[11] In other words the Muslim Conference supported the actions of the Maharaja's Government. With the National Conference leaders in prison, the National Conference ceased to function for some time as an open opposition but the Muslim Conference was unaffected and continued to participate in the proceedings of the legislature till September 1946.[12] As the differences between the Congress and the Muslim League in British India became greater, the Muslim Conference in Kashmir started advocating the Muslim League's cause in Kashmir. But at this stage, Brecher observes, "the Muslim Conference was confronted with a profound dilemma, namely its virulent opposition to the secularism of the National Conference, and the realization that its rival (Sheikh) was indispensable to its goal—the integration of Kashmir into Pakistan".[13] According to '*Dawn*' Ghulam Abbas appealed to the Maharaja to release Abdullah.[14] The Maharaja was quick to realize the danger from the Abbas group now and so, on 25th October, 1946, Ghulam Abbas and other prominent leaders of the Muslim Conference were arrested for the 'security of State'.[15] While reaction and persecution were the distinguishing pattern of political affairs in Kashmir, the movement for attaining independence was in full swing in British India.

The aftermath of the Second World War and the assumption

10 Brecher, Michael, *The Struggle for Kashmir*, p. 16.
11 *The Times*, London, 30-7-1946.
12 *Jammu and Kashmir Administration Report*, s.2004 (A.D. 1947).
13 Brecher, Michael, *op. cit.*, p. 16.
14 *Dawn*, New Delhi, 17-9-1946.
15 *Civil and Military Gazette*, Lahore, 29-10-1946.

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of power by a Labour Minister in England, brought about a change in the British policy towards India. This was first evident when the Secretary of State for India, Lord Pethick-Lawrence announced on February 19, 1946, his Government's decision to send a delegation of three Cabinet Ministers to India to find a solution for the problem of India. The Cabinet Mission consisted of Lord Pethick-Lawrence, Sir Stafford Cripps and Mr. A.V. Alexander. It arrived in India on 23rd March, 1946. Besides trying to find a solution for the Indian problem, the Mission had also to review the relationship of the Indian Native Princes with the paramount power.[16] As soon as the Mission arrived in India, Sheikh Abdullah sent a letter to it saying:

> "as the Mission is at the moment reviewing the relationship of the Princes with the Paramount power with reference to treaty rights, we wish to submit that for us in Kashmir re-examination of this relationship is a vital matter because a hundred years ago in 1846 the land and the people of Kashmir were sold away by the British for 50 lakhs of British Indian Rupees. The people of Kashmir are determined to mould their destiny and we appeal to the Mission to recognise the justice and strength of our cause."[17]

In a memorandum submitted to the Cabinet Mission later, the National Conference reiterated this demand for independence in the following words:

> "Today the national demand of the people of Kashmir is not merely the establishment of responsible Government, but their right to absolute freedom from autocratic rule. The immensity of the wrong done to our people by the sale deed of 1846 can only be judged by looking into the actual living

16 See Cmd. 6821.

17 As quoted by Sheikh Mohammed Abdullah in *Opening address to the Jammu and Kashmir Constituent Assembly* on November 5, 1951, Srinagar, 1951, p. 7.

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conditions of the people. It is the depth of our torment that has given strength to our protest."[18]

But the Cabinet Mission, while admitting the claims of the Indian National Congress and the Muslim League in British India, refused to consider the representation of the State's people.[19]

On 25th May, 1946, the Cabinet Mission issued the Memorandum dated May 12, 1946, in regard to *State's Treaties and Paramountcy*.[20] In this memorandum, the Mission affirmed that the rights of the States which flowed from their relationship with the Crown would no longer exist and the rights surrendered by the States to the Paramount Power would revert to the States when the two new Dominions of India and Pakistan are created. Paragraph 5 of the memorandum read:

"When a new fully self-governing or independent Government or Governments come into being in British India, His Majesty's Government's influence with these Governments will not be such as to enable them to carry out the obligations of paramountcy. Moreover, they cannot contemplate that British troops would be retained in India for this purpose. Thus, as a logical sequence and in view of the desires expressed to them on behalf of the Indian States, His Majesty's Government will cease to exercise the power of paramountcy. This means that the rights of the States which flow from their relationship to the Crown will no longer exist and that all the rights surrendered by the States to the Paramount power will return to the States. Political arrangements between the States on the one side and the British Crown and British India on the other will thus be brought to an end. The void will have to be filled either by States entering into a federal relationship with the successor

18 As quoted by Sheikh Mohammed Abdullah in *Opening address to the Jammu and Kashmir Constituent Assembly* on November 5, 1951, *op. cit.*, p. 7.
19 *Ibid.*, p. 7.
20 Cmd. 6835.

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> Government or Governments in British India, or failing this, entering into particular political arrangements with it or them."

The Cabinet Mission Statement made it further clear that the

> "British Government *could not* and *will not* in any circumstances transfer paramountcy to an Indian Government."[21]

The Statement by His Excellency the Viceroy of May 16, 1946 reaffirmed it in the following words:

> "It is quite clear that with the attainment of independence by British India, whether inside or outside the British Commonwealth, the relationship which has hitherto existed between the Rulers of the State's and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Government nor transferred to the new Government."[22]

But the Mission advised the States to enter into negotiations with the successor Government or Governments and evolve a scheme of the precise form which their co-operation would take.[23]

On 20th February, 1947, His Majesty's Government made an announcement[24] to the effect that independence would be granted to British India. Pursuant to this, His Majesty's Government made another statement on June 3, 1947[25] setting out its plan for the transfer of Power. *Inter alia* it provided for the creation of two independent dominions out of the *provinces comprising British India.* The plan provided that the Muslim majority areas in *British India* should constitute the Dominion of Pakistan and the Hindu majority areas the Dominion of India.

21 Cmd. 6835, Para. 20 (Emphasis mine. ASA).
22 Cmd. 6821, Para. 14.
23 Cmd. 6821.
24 Cmd. 7047.
25 Cmd. 7136.

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In this plan the position of the Princely States was dealt with in a small paragraph which read:

> "His Majesty's Government wish to make it clear that the decisions announced above (about partition) relate *only* to British India and that their policy towards Indian States contained in the Cabinet Mission Memorandum of 12th May, 1946, (Cmd. 6835) remains unchanged."[26]

Thus, it was clear that on the withdrawal of paramountcy, the princely states would become 'independent' and that the communal basis of division of India would not affect the States at all.[27] Apart from this, neither the Cabinet Mission nor the British Government made any positive suggestions regarding the future of the princely states. Hitherto they were dependent on the Paramount power, what were they to do after the withdrawal of paramountcy with their limited resources ? Moreover, if all the Princes (about 564) exerted their independence, it would have lead to choas and pose a threat to both India and Pakistan.[28] But the proposal was that, on the withdrawal of paramountcy, the States would become legally independent. The sovereignty was to *revert to the Ruler*. The power to accede to either Dominion was given to *him* and *he* was to sign the Instrument of Accession in exercise of his 'sovereignty in and over his State'.[29] Lord Cairns pointed out in *United States* v. *Wagner*:

> "The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty,

26 *Ibid.*, Para. 18 (Emphasis mine. ASA).

27 Cf. Joseph Korbel, *Danger in Kashmir*, 1954, p. 71. "...the basic pattern for accession by the Princely States to India or Pakistan was being decided exclusively on a communal basis." The statement of the British Government does not sustain this contention.

28 See Talbot, Phillip, 'Kashmir and Hyderabad' in *World Politics*, No. 3, April 1949.

29 *Instrument of Accession*, Para. 3.

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it is the sovereign, and not the State, or the subjects of the sovereign, that is recognised."[30]

It was clear that sovereignty would revert to the Ruler on the transfer of power and not to the people.

When implementation of the plan in the statement of June 3 commenced, as part of the partition machinery, in order that each Dominion Government should have an organisation to conduct its relations with the princely States, a State Department in each Dominion was set up.[31]

Lord Mountbatten as the Crown Representative, addressed the Chamber of Princes on July 25, 1947. He advised the Princes and their representatives, although legally they had become independent, to accede to one or other of the Dominions before the transfer of power, keeping in mind the 'geographical contiguity' of their States.[32] Accession, he told them, was to be under the Cabinet Mission Memorandum of May 16, which contemplated surrender to the Central Government of only three subjects, Defence, External Affairs and Communications. After warning the States, "if you do not link with one or the other of the Dominions, you may be cut off from any source of supply", Lord Mountbatten caused to be circulated for discussion a draft Instrument of Accession which provided for surrender to the appropriate Dominion the power over three subjects specified, without any financial liability. The draft explicitly provided that in no other matters was the Central Government to have any authority over the internal autonomy of the States. In the Indian Dominion the accession was to be made under Section 6 of the Government of India Act, 1935, as adapted by Section 9 of the Indian Independence Act, 1947.

A State could accede to either Dominion by executing an Instrument of Accession signed by the Ruler and accepted by the Governor-General of the Dominion concerned. Legally, the interests of India and Pakistan in a particular State had no

30 (1867) L.R. 2 Ch. 582.
See also, *Civilian War Claimants Association* v. *The King* (1932) A.C. 14.
31 *White Papers on Indian States*, New Delhi, 1950, pp. 32-33.
32 *Keesing's Contemporary Archives, August 9-16, 1947*, p. 8765.

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relevance ; the decisions whether to accede or not and to which Dominion were not only independent of such considerations but an exclusive right of the Ruler.[33]

(2) KASHMIR AT THE TIME OF INDIAN INDEPENDENCE

We have seen in the preceding pages the state of affairs in Kashmir on the eve of the transfer of power. On 15th August, 1947, the sub-continent was making grand preparations for the Day of Indian Independence but Kashmir, as we shall presently see, was heading for a catastrophe.

In accordance with the Cabinet Mission Plan of May 1946,[34] following partition, Kashmir bordering on both India and Pakistan had, like any other state, three alternatives, to assert complete independence, to accede to Pakistan, or to accede to India. Power to take the decision vested in the Ruler according to the British Government's declared policy. The State of Jammu and Kashmir did not accede to either dominion by the 15th August and so became independent as from that date.[35]

We have noted the tension which was growing between Muslim Conference, an ally of the All India Muslim League representing the non-nationalist Muslims of Kashmir and the National Conference, an ally of Congress, claiming the support of the people of all religions. Although the leadership of both organisations (National Conference and the Muslim Conference) was in the hands of Muslims, yet, the two were diametrically opposed to each other. Observes Brecher, "the National Conference was, and still is, an embarrassment to the protagonists of the two nation theory, whether they be in Pakistan or in India...".[36]

33 See Gupta, N.C., 'Legal aspects of the Kashmir Dispute,' in *Indian Law Review*, Vol. IX, No. 2, 1957, p. 126. Also, Das, Taraknath, 'Status of Hyderabad during and after the British Rule in India,' in *American Journal of International Law*, (43).

34 Cmd. 6835.

35 See Anand, A.S., 'The legality of Kashmir's Accession' in *Indian Socialist*, London, 15th May, 1962, No. 3, p. 2.

36 Brecher, Michael, *The struggle for Kashmir*, p. 11.

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The public in Kashmir was at this time interested not so much in accession to India and Pakistan as in the establishment of a responsible government in the State. Thus, whereas in 1931 religion had played no small part in rousing the passions and emotions of Kashmiri Muslims, in 1946 religion was being consciously divorced from politics.[37] And when Mr. Jinnah advised the "Mussalmans" of the State to unite under one banner the meeting broke up in pandemonium amidst shouts of 'Go back Jinnah'. Such was the response of the people to Mr. Jinnah's advice.[38]

On 15th August, 1947, most of the leaders of the National Conference and the Muslim Conference were in prison. But when the people of the State saw that in India independence had come, they once again raised their heads and demanded the establishment of responsible government.[39] In the absence of 'British help', which he had hitherto been getting to "suppress the internal rebellion and external aggression", Maharaja Hari Singh found himself in a tight corner. Previously he had been averse to parting with an iota of power, but now he had seriously to consider the three alternatives, accession to India, accession to Pakistan, and independence. "He disliked the idea of becoming a part of India, which was being democratized, or of Pakistan, which was Muslim... . He thought of independence".[40] He offered to sign a *standstill agreement* with both India and Pakistan aimed at continuing the existing relationship pending his final decision regarding the future of the State. He sent two identical telegrams to both India and Pakistan on August 12, 1947 in the following words:

> "Jammu and Kashmir Government would welcome Standstill Agreement with India/Pakistan on all matters on which there exist at the present moment with outgoing British

37 Bazaz, P.N., *History of Struggle for Freedom in Kashmir*, p. 237.

38 Government of Jammu and Kashmir, *Kashmir—a conflict two ways of life*, Srinagar, p. 6.

39 *The Khidmat*, (Urdu), Sringar, 15-9-1947.

40 Brown, W.N., *The United States and India and Pakistan*, Cambridge 1953, p. 162.

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India Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh orders."[41]

The Foreign Secretary to the Government of Pakistan, Karachi, replied on 15th August, 1947:

"Your telegram of the 12th. The Government of Pakistan agree to have a Standstill Agreement with the Government of Jammu and Kashmir for the continuance of the existing arrangements pending settlement of details and formal execution of fresh agreements."[42]

The Government of India replied to the Prime Minister of Kashmir:

"Government of India would be glad if you or some other Minister duly authorised in this behalf could fly to Delhi for negotiating Standstill Agreement between Kashmir Government and Indian Dominion. Early action desirable to maintain intact existing agreements and administrative arrangements."[43]

For a variety of reasons, no standstill agreement was concluded between Kashmir and India. According to Mr. Mahajan, the former Chief Justice of India, Mr. Nehru, the Prime Minister of India was interested not so much in the accession of the State to India as in the power being given to the popular leaders. Whatever the reason, "the absence of a formal agreement between India and the Maharaja was interpreted by the Pakistanis to mean that ultimately Kashmir would become a part of Pakistan.[44] And in fact Pakistan started putting pressure on the Maharaja to join Pakistan. Mr. Jinnah's private secretary

41 Lakhanpal, P.L., "Essential documents and notes on Kashmir Dispute," Delhi, 1958.
42 *Ibid.*, p. 45.
43 Lakhanpal, P.L., "Essential documents and notes on Kashmir Dispute," *op. cit.*, p. 45.
44 Brecher, Michael. *op. cit.*, p. 23.

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came to Srinagar at this time and "His Highness was told that he was an independent sovereign, that he alone had the power to give accession; that he need consult nobody, that he should not care for the National Confe rence or Sheikh Abdullah...that he need not delegate any of his powers to the people of the State and that Pakistan would not touch a hair of his head or take away an iota of his power"[45] if he acceded to Pakistan. But the "Maharaja refused to take Mr. Jinnah's promise literally".[46] As we have already noted he was flirting with the idea of independence and probably, "that procrastinating Prince hoped to triumph by delay"[47] but the people were tired of uncertainty, and in the second week of August, there occurred the 'Poonch revolt' against the authority of the Maharaja. "The Maharaja, therefore, found himself in a quandary, facing a qualitatively new situation which he had not forseen. It was now dawning on him that he could no longer hold the Kashmiri people in subjection through reliance on the army and police alone nor toy with the idea of independence for long."[48] Maharaja's Government alleged that the revolt in Poonch was due to infiltration from Pakistan and the Pakistan Government charged the Kashmir Government with attacking the Muslim villages in the State.[49] Side by side started an *economic blockade*[50] from Pakistan and this lent support to Kashmir Government's charges. Pakistan never unequivocally denied the charge of economic blockade. It, however, pleaded special circumstances. In its cable of October 2, 1947, the Pakistan Foreign Minister informed the Prime Minister of Kashmir:

45 Mahajan, M.C., *Accession of Kashmir to India (The inside story)*, Sholapur, p. 2.

46 Mahajan, M.C., *Accession of Kashmir to India (The inside story) op. cit.*, p. 3.

47 Moraes, Frank, *Jawaharlal Nehru: A biography*, New York, 1956, p. 385.

48 Vijay Kumar, *Anglo-American plot against Kashmir*, Bombay, 1954, p. 55.

49 For text of the charges see *White papers on Jammu and Kashmir*, New Delhi, 1948, Documents, Part 1, pp. 6-13.

50 See Taraknath Das, 'Kashmir issue and the United Nations' in *Political Science Quarterly*, New York, June 1950, p. 265.

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> "We are willing to do everything we can and are indeed taking steps to see that Kashmir is supplied with essential commodities of which it is in need. It must however be appreciated that certain difficulties stand in our way. Driver of lorries for instance, are reluctant to carry supplies between Rawalpindi and Kohala."[51]

Whereas the Pakistan Government was pleading special reasons, *Dawn*, the Muslim League's official organ, said on August 24, 1947, "the time has come to tell the Maharaja of Kashmir that he must make his choice and choose Pakistan". Should Kashmir fail to join Pakistan, "the gravest possible trouble will inevitably ensue". This threat alarmed the Maharaja, caught on the horns of a dilemma. On the advice of his Prime Minister, His Highness took a qualified letter of apology from Sheikh Abdullah and released him[52] on September 29, 1947. Once again the Government of Jammu and Kashmir alleged that Pakistan wanted to coerce the State to accede to Pakistan, and once again Pakistan denied it in its letter to the Government of Jammu and Kashmir on October 2, 1947:

> "It is entirely wrong to attribute difficulties in transport which have arisen owing to circumstances beyond the control of the West Punjab Government to the unfriendly intentions of that Government or to regard it as an act of coercion on your Government in taking a decision about accession of the State."[53]

However, it is difficult to substantiate or disprove the charges and counter charges.[54] Public opinion in Kashmir was "sharply divided along political as well as religious lines. Both India and Pakistan had substantial support".[55] An now since Sheikh Abdullah was no longer in prison, "they (Pakistan) could not

51 *White Papers on Jammu and Kashmir*, pp. 6-13.
52 Mahajan, M.C., *op. cit.*, p. 5.
53 *White Papers on Jammu and Kashmir*, pp. 6-13.
54 Source of information in Newspapers cited.
55 Thorner, Mrs. Alice, 'Issues in Kashmir,' *Far Eastern Survey*, No. 15, August 11, 1948.

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so easily dispose, however, of the tenacious resistance against Jinnah and Pakistan of Kashmir's largest political party, the Kashmir National Conference which was Muslim led and largely Muslim supported".[56] Soon after his release, Sheikh Abdullah addressed a public meeting in Srinagar. He reiterated that the main demand of the Kashmiris was '*Freedom before accession*'. He, however, emphatically added:

> "How can Muslim League or Mr. Jinnah tell us that we should accede to Pakistan? They have always opposed us in every struggle. Even in our present struggle (Quit Kashmir), he (Mr. Jinnah) carried on propaganda against us and went on saying that there was no struggle of any kind in the State. He even termed us Goondas."[57]

Although Abdullah was opposed to the 'two nation theory,' yet he told the leaders of Pakistan:

> "...that, whatever had been the attitude of Pakistan towards our freedom movement in the past, it would not influence us in our judgement. Neither, the friendship of Pandit Nehru and of Congress nor their support of our freedom movement would have any influence upon our decision if we felt that the interests of four million Kashmiris lay in our accession to Pakistan."[58]

From a strictly legal standpoint, this statement is irrelevant, for the people had no right to be consulted on the issue of accession. But from the political standpoint, public opinion should have been considered by the Ruler although if he did not conform to the wishes of the people, there was no legal process to compel him. The Ruler was, even at this stage,

56 Talbot Phillip, 'Kashmir and Hyderabad,' *World Politics*, No. 3, April 1949.
57 As quoted by Kaul and Dhar, *Kashmir Speaks*, p. 54.
58 S/P V. 241, 5-2-1948, p. 82.

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undecided. This chronic indecision of the Maharaja was the cause of all the turmoil to which the State was later subjected.

Tribal Invasion

On October 20, 1947, a large column of several thousand tribesmen armed with 'bren guns, machine guns, mortars and flame throwers'[59] attacked the frontiers of the State. 'Srinagar trembled before the danger of the tribesmen's invasion."[60] It was alleged that the tribesmen were being aided by Pakistan. Margaret Bourke White, who has done some research on the attack, records:

> "Certainly these miniature ballistic establishments (the small factories in the tribal areas) would hardly explain the mortars, other heavy modern weapons and the two aeroplanes with which the invaders were equipped. In Pakistan towns close to the border arms were handed out before daylight to tribesmen directly from the front steps of Muslim League Headquarters. This was not *quite* the same thing as though the invaders were being armed directly by the Government of Pakistan. Still Pakistan is a nation with one political party—the Muslim League."[61]

And Menon observes that "to contend that the tribal invasion of Kashmir was wholly a spontaneous affair would be too huge a strain on human credulity".[62] The noted British Statesman, Lord Birdwood remarks "the fact that tribesmen carried a certain amount of equipment and arms which could not have come from the limited means of the tribal factories was a proof of a leakage from Pakistan's regular forces".[63] But it is difficult to prove that the Government of Pakistan was at the back of the tribal invasion. However, it is an admitted fact that the

59 Mr. Nehru's statement in the Constituent Assembly of India, 25-11-1947.
60 Korbel, Joseph, *op. cit.*, p. 77.
61 Bourke-White, Margaret, *Halfway to Freedom*, p. 208.
62 Menon, V.P., *The integration of the Indian States*, p. 414.
63 Lord Birdwood, *Two Nation and Kashmir*, London, 1956, p. 53.

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tribesmen invaded Kashmir from Pakistan territory. And even if Pakistan was not directly aiding the tribesmen, its territory was being used by them for the purposes of the invasion. Mr. W.E. Hall, the leading authority in International law, says:

> "A State must not only itself obey the law, but it must take responsible care that illegal acts are not done within its dominions. Foreign nations have a right to take acts done upon the territory of a State as being *prima facie* in consonance with its will... ."[64]

The same view was adopted by the Supreme Court of America. It laid down:

> "from the supremacy and exclusiveness of territorial jurisdiction, it follows that it is the duty of a state, within the bonds of legal responsibility, to prevent its territory and territorial waters from being used to the injury of another State."[65]

The tribal invasion caused great devastation. By "October 24th even the chronic indecision of Hari Singh had given place to deep seated alarm and to a genuine concern for his personal safety."[66] The raiders were now fast approaching Srinagar, the summer capital of Kashmir; the Maharaja was extremely nervous. The Dogra Army and the National Militia, which was a volunteer Militia force formed by the National Conference, tried to hold the enemy's onrush but "prolonged resistance to well trained and well equipped invaders was out of the question. The invaders were meanwhile pushing ahead, destroying and looting whatever came there way".[67] The state was at this time in imminent peril and the Maharaja saw his dream of independence shattered like a 'house of cards'. He thought of accession to save his State. Panikkar suggests "...it was only as a last resort that the Maharaja approached

64 Hall, W.E., *A Treatise on International Law*, Oxford, 1924, p. 64.
65 *United States* v. *Arjona*, (1887) 120 U.S. 479.
66 Moraes, Frank, *op. cit.*, p. 390.
67 Government of Jammu and Kashmir, *Kashmir Forges Ahead*, p. 11.

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the Dominion of India to accept the accession".[68] Campbell-Johnson goes even further and suggests:

> "It is probable that nothing short of a fullscale tribal invasion to the gates of his capital would have induced the hesitating Maharaja to accede at all."[69]

To save his life, Maharaja Hari Singh left Srinagar on 25th October, and went to Jammu, the winter capital of Kashmir. He left his 'beloved people' to face the crises. He appointed Sheikh Mohammed Abdullah, the emergency administrator before leaving the summer capital. Sheikh Abdullah advised the Maharaja that if the State was to be saved, he must accede to India and ask for immediate military help. Faced with such a serious crises, Maharaja Hari Singh at last with great reluctance wrote to Lord Mountbatten, the Governor-General of India.

(3) KASHMIR ACCEDES TO INDIA

Maharaja Hari Singh's letter to Lord Mountbatten read:

> "I have to inform your Excellency that a grave emergency has arisen in my State and request the immediate assistance of your Government. As your Excellency is aware, the State of Jammu and Kashmir has not acceded to either the Dominion of India or Pakistan. Geographically my State is contiguous with both of them. Besides, my state has a common boundary with the Union of Soviet Socialist Republic and with China. In their external relations the Dominions of India and Pakistan cannot ignore this fact. I wanted to take time to decide to which Dominion I should accede or whether it is not in the best interests of both the Dominions and my State to stand independent, of course with friendly relations with both."

68 Panikkar, K.M., *A Study of Kashmir and Jammu*, 1948, p. 4.
69 Campbell-Johnson, Alan, *Mission with Mountbatten*, London, p. 240.

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After this paragraph followed an account of the Tribal invasion and then His Highness wrote:

> "With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian Dominion. Naturally, they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government."

The Maharaja knew that the Government of India was more interested in power being given to the people's representatives than in the accession of the State to India and so accordingly in another paragraph he wrote:

> "I may also inform your Excellency's Government that it is my intention at once to set up an interim government and to ask Sheikh Abdullah to carry the responsibilities in the emergency with my prime minister."[70]

Attached to the letter was the *Instrument of Accession* duly signed by the Ruler, Maharaja Hari Singh. The operative part of the same read:

> "Whereas, the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act, 1935, shall with such omissions, additions, adaptations and modifications as the Governor-General may by order specify be applicable to the Dominion of India;
>
> And whereas the Government of India Act, 1935, as adopted by the Governor-General, provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof;

70 For text of the letter see *White Papers on Jammu and Kashmir*, 1948, pp. 46-47.

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Now therefore I Shriman Indar Mahander Rajrajeshwar Maharajadhiraj Shri Hari Singh ji Jammu Kashmir Naresh Tatha Tibet adi Deshadhipathi Ruler of Jammu and Kashmir State in the exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession... ."[71]

Lord Mountbatten, the Governor-General of India indicated his acceptance in the following words:

"I do hereby accept this Instrument of Accession.
Dated this twenty-seventh day of October Nineteen hundred and forty-seven."[72]

This *Instrument of Accession* was in no way different from that executed by some 500 other States. It was *unconditional*, *voluntary* and *absolute*. It was not subject to any exceptions. As such, it bound the State of Jammu and Kashmir and India together legally and constitutionally. And so, regarding the legality of the accession in the judicial sense of the word there is no doubt. Indeed as Campbell-Johnson says:

"The legality of the accession is beyond doubt.... It should be stressed that the accession has complete validity both in terms of the British Government's and Jinnah's expressed policy statements."[73]

The execution of the Instrument of Accession by the Ruler and its acceptance by Governor-General finally settled the issue of accession of the State of Jammu and Kashmir. *After* accepting the Instrument of Accession, Lord Mountbatten wrote a *personal* letter to Maharaja Hari Singh, in reply to his letter which had accompanied the Instrument of Accession. It must, however, be pointed out here that Maharaja's letter was no part of the

71 *Ibid.*, pp. 48-50.
72 For Text of the *Instrument of Accession*, see Appendix III, post.
73 Campbell-Johnson, Alan, *Mission with Mountbatten*, p. 225.

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Instrument of Accession. In his letter Lord Mountbatten wrote:

> "...my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the *subject of dispute*, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's *wish* that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of State's accession should be settled by a reference to the people."[74]

This statement has figured as the most controversial feature of Kashmir's accession to India. Critics of the accession have steadfastly maintained that this stipulation renders the Accession conditional. The present writer believes that this statement *does not* and *cannot* effect the legality of the accession which was sealed by India's official acceptance. This statement is *not* a part of the Instrument of Accession. Mr. M.C. Mahajan, the former Chief Justice of India has observed thus:

> "The Indian Independence Act did not envisage conditional accession. It could not envisage such a situation as it would be outside the Parliament's policy. It wanted to keep no Indian State in a state of suspense. It conferred on the rulers of the Indian States absolute power in their discretion to accede to either of the two Dominions. The Dominion's Governor-General had the power to accept the accession or reject the offer but he had no power to keep the question open or attach conditions to it... ."[75]

The only documents relevant to the accession were the Instrument of Accession and the Indian Independence Act and as the

74 *White Papers on Jammu and Kashmir*, pp. 47-48. (Emphasis mine. ASA).
75 Mahajan, M.C., *op. cit.*, pp. 19-20.

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Constitutional documents did not contemplate any conditions, there can be no question of the accession having been conditional. In the words of Mahajan:

> "Finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Any rider which militates against the finality is clearly *ultra vires* and has to be rejected."[76]

But although this is the position from the strictly legal point of view, let us consider the effect of the 'wish' to ascertain the wishes of the people. Lord Mountbatten in expressing the wish was probably expressing a pious hope—a declaration without legal effect. At best it was a formal declaration of the policy of the Government of India at that moment. But even if it was only that, there was never any agreement between the Ruler of Kashmir and the Government of India regarding the ascertainment of the wishes of the people. It was a unilateral declaration—a declaration to which the Maharaja was never asked to agree. For any contract to be binding, law requires offer and acceptance. In this case it would seem that Lord Mountbatten made an offer but the Maharaja did not signify his acceptance.

The Maharaja offered to accede on the three subjects. It was not contemplated that the accession should be postponed until the wishes of the people had been ascertained or until the Maharaja had promised that they would be ascertained. Lord Mountbatten's unilateral declaration cannot be regarded as implying that it was with the people of the State that India was going to unite and not the ruler for the act of accession, it has been freely recognised, is the 'prerogative of the prince'.[77] The declaration was probably intended to show to the people of the State that the Government of India desired to democratise the State. Such an expression of policy or opinion cannot be regarded as a condition attached to acceptance of Kashmir's

76 Mahajan, M.C., *op. cit.*, p. 21.
77 Campbell-Johnson, Alan, *op. cit.*, p. 192.

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accession. It cannot be regarded as a 'proposal' within the meaning of the Indian Contract Act.

However, Pakistan refused to recognise this accession.[78] *Dawn*, the Muslim League's Official Organ quoted Mr. Liaquat Ali Khan saying:

> "We do not recognise this accession. The accession of Kashmir to India is a fraud, perpetrated on the people of Kashmir by its cowardly Ruler with the aggressive help of Indian Government."[79]

A few days later the same Newspaper quoted the Prime Minister of Pakistan saying:

> "There is not the slightest doubt that the whole plot of accession of Kashmir to India was preplanned. It cannot be justified on any moral or political grounds."[80]

The same thesis was presented by Sir Mohammed Zafarullah Khan,[81] Pakistan's Foreign Minister in 1951. Sir Zafarullah also alleged in support of his argument that the Maharaja had no authority to sign the Instrument of Accession as he had lost the confidence of his people.[82]

It is difficult to regard the Pakistani charges as anything more than abuse. Fraud is causing a person to do something to his detriment or another's advantage by deceit and if it be conceded that India secured an advantage by Kashmir's accession, there is no evidence of any deceit practised by India on Kashmir. If by fraud it is meant that the Government of India should not have accepted the accession made by the Ruler

78 It must, however, be remarked that recognition by either Dominion was not required for the legality of the accession. The accession of the States was purely a matter between the State's Ruler and the concerned Dominion.

79 *Dawn*, Karachi, 5-11-1947.

80 *Ibid.*, 17-11-1947.

81 At present the President of the United Nations General Assembly. See *Guardian*, London, 19-9-1962.

82 S/P.V. 534, 6-3-1951.

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of Kashmir unless it had been endorsed by the people, it is submitted that the Government of India had no authority to question the right of the Maharaja to sign the Instrument of Accession, as he alone had the right and power to take a decision for his state. To have asked the Ruler to establish his right to sign the Instrument of Accession would have meant that the Government of India was going to meddle with the internal politics of the State. Law does not permit any such intervention in the affairs of another State. India had no claim to Kashmir before that State acceded to it ; it acquired title only after the Governor-General had accepted the Instrument of Accession of the Ruler. With regard to the contention that the accession was obtained by force, Campbell-Johnson writes, "Indeed, the State's Ministry, under Patel's direction, went out of its way to take no action which could be interpreted as forcing Kashmir's hand and to give assurances that accession to Pakistan would not be taken amiss by India".[83] On his return to London, Lord Mountbatten narrated:

> "Had he (the Maharaja of Kashmir) acceded to Pakistan before August 14, the future Government of India had allowed me to give His Highness an assurance that no objection whatever would be raised by them."[84]

Moreover, it cannot be denied that the Maharaja of Kashmir offered to accede to the Indian Dominion *after* the assaults and raids had started on the State. When at his meeting with Lord Mountbatten on November 1, Mr. Jinnah claimed that the accession of Kashmir to India was based on violence, Lord Mountbatten replied, "the accession had indeed been brought about by violence, but the violence came from tribesmen, for whom Pakistan, and not India was responsible".[85] Indian law recognises as voidable a contract procured by coercion, but only

83 Campbell-Johnson, Alan, *op. cit.*, p. 223.
84 Speech to the members of the East India Association, London on June 29, 1948, reproduced in Lord Mounbatten, *Time only to look forward.* p. 269.
85 Campbell-Johnson, Alan, *op. cit.*, p. 229.

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when the coercion was exercised by or for the party to the contract other than the party coerced. India exercised no coercion; the tribesmen were not acting on behalf of India and whatever their objective, it was not to compel Kashmir to accede to India.

It is interesting to note that the accession of Kashmir to India is analogous to the annexation of Texas by the United States of America. When Mexico separated from the Spanish Empire and set up as an independent Republic, Texas was an integral part of the new State. Later, Texas revolted against the Mexican authorities and established itself as an independent entity. The independent status of Texas was recognised by the United States of America and the principal powers of Europe. In 1844, the Government of Texas, threatened by the menace of predatory incursions from Mexico, requested the Government of the United States of America to annex the State. This proposal was sanctioned by the American Congress in a joint resolution in March 1845. After this America sent an Army to defend the Western frontiers of Texas. The Government of Mexico strongly protested against this as a violation of the rights of Mexico and diplomatic intercourse between the two Governments was suspended. The Mexican protest evoked the following reply from the Government of the United States of America:

> "The Government of United States did not consider this joint resolution as a violation of any of the rights of Mexico, or that it offered any just cause or offence to its Government; that the Republic of Texas was an independent power, owing no allegiance to Mexico, and constituting no part of her territory or rightful sovereignty and jurisdiction."[86]

In Texas case it was not contended that the annexation was by force or fraud and the present writer submits that the allegation cannot be substantiated in the case of Kashmir either.

86 Moore, J.B., *Digest of International Law*, Washington, 1906, Vol. I, p. 277.

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Let us now consider whether the Maharaja had the right to sign the Instrument of Accession for his State or not. During the British administration in India, the Crown dealt with the Maharaja alone. It recognised him only. Also, when the Government of Pakistan concluded a Standstill Agreement with the Maharaja, it did so on the basis that the Maharaja was the sole representative of the State. These associations were perfectly justified for, in a monarchical form of Government, it is the Monarch who personifies and represents the State.[87] And the Government of India, in its relations with the Maharaja, acted in accordance with law and recognised international practice. The accession of the State to India cannot be called in question on any legal grounds.

However, on the contention that the accession cannot be justified on moral grounds, there might be something to be said. After Lord Mountbatten had expressed his 'wish', India might be regarded as under a moral obligation to honour that pledge, if Lord Mountbatten had authority to give that pledge and if it is binding. Assuming, for the sake of an argument that India has a moral obligation to ascertain the wishes of the Kashmiri people, let us consider whether the law permits any such obligation to be given effect to. The former Chief Justice of India Mahajan holds, "the moral grounds...cannot override constitutional and statutory provisions. Even the Directive Principles of the Indian Constitution confer no such authority". He goes on to say "such promises cannot bind India... . They cannot deprive the Rulers of their Constitutional powers"[88] to accede to any Dominion they desire. So, no moral obligation can affect the legality of the accession. No court can take notice of a moral obligation not embodied in the constitutional documents.

The courts will not look behind the document of Instrument of Accession and the Supreme Court of India has held[39] that the 'act of the execution of the Instrument of Accession by the Ruler

87 *United States* v. *Wagner*, (1867) L.R. 2 Ch. 582.
88 Mahajan, M.C., *op. cit.*, pp. 21-22.
89 *Virendra* v. *State of U.P.* [1954] S.C.A. 686 at 699,

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and its acceptance by the Governor-General are both Acts of State into whose competency no court can enquire'.

Furthermore, can this 'pious and moral obligation' bind Kashmir to do what the then Ruler of Kashmir never agreed to do. It is submitted it cannot. If there is a moral obligation to ascertain the wishes of the people of Kashmir, the Indian Constitution has no provision for such a step in the process of amendment of the State's Constitution.

(4) KASHMIR'S ACCESSION AND THE SECURITY COUNCIL[90]

The accession of the State of Jammu and Kashmir to India imposed an obligation on the Dominion of India to defend the State. This accession, as we have already noted, took place at the time when the State was being invaded by the tribesmen from Pakistan territory. To drive the invader out of the State was the task which the Dominion of India was asked to face as soon as it officially accepted the Accession of Kashmir.

On the very day of accession, Indian troops were flown to Kashmir valley to drive the aggressor out. On October 28, 1947, Mr. Nehru sent a cable to Mr. Liaquat Ali Khan inviting his 'Government's co-operation' in stopping the raiders.[91] Mr. Liaquat Ali Khan in his reply to Mr. Nehru on October 30, did not promise the co-operation but alleged, "Your recent action of sending troops to Kashmir on the pretext of accession has made things infinitely worse. The whole of the frontier is stirring and the feeling of resentment among tribes is intense. The responsibility of what is happening is entirely yours".[92] Mr. Nehru denied the Pakistan charge in his telegram to Mr. Liaquat Ali Khan on October 31st, and appealed to him to do

90 The controversy over the State of Kashmir is outside the scope of this thesis. The purpose of writing this section is to examine the treatment of 'Accession' in the U.N.O.

91 For full text please see Lakhanpal, P.L., *Essential Documents and notes on Kashmir dispute*, pp. 64-65.

92 *Ibid.*, p. 68.

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his utmost to stop the raids.[93] The telegrams and letters exchanged between Mr. Nehru and Mr. Liaquat Ali Khan from this point onwards consist of allegations and counter-allegations. In the meanwhile, on the assumption that Kashmir was Indian territory, the Indian Army started operations. "The Indian troops...discovered that the invaders had the active assistance of the Pakistan authorities and their bases and sources of supply were located in Pakistan territory". It was a comparatively new situation and the Indian army found that "the only way the raiders could be completely removed from Kashmir was by attacking their bases and sources of supply in Pakistan; India warned Pakistan, on December 22, 1947 that unless Pakistan denied her assistance and bases to the invaders, India would be compelled to take such action".[94] The tension and the sense of strain over Kashmir was more apparent now. Mountbatten urged Nehru "the overwhelming need for caution and restraint". He stressed, "how embroilment in war with Pakistan would undermine the whole of Nehru's independent foreign policy and progressive social aspirations."[95] Nehru considered Mountbatten's advice and on his (Mountbatten's) suggestion decided to lodge a complaint to the Security Council.

India invoked Article 35 of the Charter of United Nations and complained to the Security Council against Pakistan. Under Article 35, a member is entitled to bring before the Security Council a 'situation' which imperils the international peace. The Government of India appealed to the Security Council, to ask the Government of Pakistan:

(1) to prevent Pakistan Government personnel, military and civil, participating in or assisting the invasion of Jammu and Kashmir State;
(2) to call upon other Pakistani nationals to desist from

93 Lakhanpal, P.L., *Essential Documents and notes on Kashmir dispute*, p 71.
94 High Commission of India, *Kashmir*, London, 1962, p. 4.
95 Campbell-Johnson, A., *op. cit.*, p. 256.

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taking any part in the fighting in Jammu and Kashmir State;

(3) to deny to the invaders:

(a) access to and use of its territory for operations against Kashmir;
(b) military and other supplies;
(c) all kinds of aid that might tend to prolong the present struggle.[96]

This was India's case and as Lord Birdwood observed, "Illegal act of aggression by Pakistan and a legal accession of Kashmir to India is therefore, the basis of the Indian case".[97]

On January 15, 1948, there was delivered to the Secretary General of the Security Council a letter from the Pakistan Government emphatically rejecting the Indian charges. The letter made counter charges against India. These amongst others included:

(1) a persistent attempt to undo the partition scheme;
(2) a preplanned and extensive campaign of genocide against the Muslims in East Punjab and Punjab princely States;
(3) the acquisition of Kashmir's accession by fraud and violence.[98]

Throughout the prolonged deliberations of the Council, India's spokesmen concentrated their attention almost exclusively on the tribal invasion and the legal fact of Kashmir's accession to India. This was, indeed, the limited issue referred to the United Nations. Indian spokesman concluded his opening statement by declaring:

96 Text in S/628 dated 2-1-1948. (S stands for Security Council document and S/P.V. for Security Council Verbatim reports).
97 Lt. Col. Lord Birdwood, 'Kashmir Dilemma' *Fortnightly Review*, London, August 1952.
98 S/ 646 dated 15-1-1948.

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> "We have referred to the Security Council a simple and straightforward issue... . The withdrawal and expulsion of the raiders and the invaders from the soil of Kashmir and the immediate stoppage of the fight are. ..the first and the only tasks to which we have to address ourselves."[99]

The Security Council, in accepting India's complaint, did indirectly recognise the accession of the State of Jammu and Kashmir to India and indeed the legality of the accession was not the point which India had brought before the Security Council. It is important to note that the question of aggression *alone* falls within the competence of the Security Council.

The Indian spokesman's statement was followed by a brilliant statement by Sir Mohammad Zafarullah Khan of Pakistan. He made every effort to broaden the issue and so in his opening address to the Security Council he declared:

> "The issue does not appear to us to be either as simple or as straightforward as the representative of India has tried to make out...and it will be necessary to set out before the Security Council the whole background of this Kashmir problem."[100]

A few days later he remarked:

> "What is happening in Kashmir is a continuance of the process which has reached its culmination in the State of East Punjab (the communal riots) and cannot be divorced from it."[101]

In reply, the Indian delegate once again placed special emphasis on the tribal invasion and observed:

> 'In our view, the story of these happenings all over India...

99 S/P.V. 227 dated 15-1-1948.
100 S/P.V. 227; p. 31 as reproduced in *Security Council Official Records*. Third Year Nos. 1-15 (Hereinafter referred to as S.C.O.R. etc. etc.).
101 S/P.V. 229; p. 117. S.C.O.R. Third Year Nos. 1-15.

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> are totally irrelevant to the issue now existing between India and Pakistan in regard to Jammu and Kashmir.... We submit that these events and the causes which led to them are altogether beside the point... The only issue, and the prime issue, before the council is the issue relating to the invasion of Kashmir."[102]

The result of these deliberations at the floor of the Security Council was the resolution dated January 17, 1948, which both India and Pakistan accepted. In this resolution the Security Council called upon India and Pakistan "to take immediately all measures within their power (including public appeals to their people) calculated to improve the situation and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation... ."[103]

On January 27, 1948, India and Pakistan submitted draft proposals to the President of the Security Council on the appropriate methods of solving the Kashmir Dispute.[104] It was in this proposal that India agreed to the holding of a plebiscite in Kashmir as the ultimate determinant of Kashmir's status. The Indian representative observed on the floor of the Council:

> "In accepting the accession they (India) refused to take advantage of the immediate peril in which the State found itself and informed the Ruler that the accession should finally be settled by plebiscite as soon as peace had been restored."[105]

It was this statement which caused doubts in the mind of the members of the Security Council about the finality and the legality of the accession. The Indian representative made it appear that the accession was temporary and that the final status of Kashmir was to be determined by plebiscite. Although the legal nature of Kashmir's accession was the foundation of India's

102 S/P.V. 234, January 23, 1948.
103 S/651, 17-1-1948.
104 Text in S/P.V. 236.
105 S/P.V. 227.

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case, the Indian representative made it appear as if the accession was conditional. Pakistan has since seized upon and used this point for its benefit in the Security Council.[106] However, the present writer is concerned only with the legality of accession and the force of the commitment to hold a plebiscite in Kashmir.

One fails to see how the question of accession of Kashmir can be reopened. The accession of Kashmir was an issue arising out of the partition of India and the negotiations preceding it. It is not within the competence of the Security Council to reopen this question either at the instance of India or of Pakistan. The only party which might have a right to demand it is the Ruler of Kashmir who signed the Instrument of Accession or his successor in interest. Mahajan maintains that "the question of aggression alone falls within its (Security Council's) competence",[107] and goes on to say, "I do not see what constitutional power the Indian Government had to enter into such an agreement with Pakistan on the floor of the Security Council and how such an undertaking can be considered as binding...on the State of Jammu and Kashmir which had independent status before accession. The document of accession is India's title deed to Kashmir... .[108] The Instrument of Accession did not give to the Dominion of India any power to barter the future of the State. As such it would seem that the undertaking given at the floor of the Security Council is "wholly *ultra vires* the Independence Act and the constitutional powers of the two Dominions... .[109]

The Constitution of India was adopted in 1949. Since the term of association of Kashmir with India was based on the Instrument of Accession and subject to its terms and conditions, Article 370 was added to the Constitution to cover the case of Kashmir alone.[110] This Article did not confer on the Indian Government any power to enter into agreement with Pakistan

106 See S/1430, 5th January, 1948.
107 Mahajan, M C., *op. cit.*, p. 19.
108 Mahajan, M.C., *op. cit.*, p. 19.
109 *Ibid.*, p. 20.
110 See Chapter 5, p. 128 post for discussion of Article 370.

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about the future of the State. The Government of India has no constitutional power to reconsider the question of Kashmir's accession. Once India has accepted the Instrument of Accession, it cannot revoke its acceptance except by the procedure established by law.

Article 253 of the Constitution of India deals with the Parliament's power to make laws for the whole or any part of the territory of India for giving effect to International Agreements.[111] Although, the Supreme Court of India has observed in the *Berubari Union* case [112] that there is no provision in the Constitution of India which provides for cession of national territory, let us examine whether the Government of India can enter into an agreement to hold a plebiscite in one of its component parts, Kashmir, to give effect to an International agreement and as a result of which it has either to cede Kashmir or to make it independent.

Article 253 applies to the State of Jammu and Kashmir with effect from May 14, 1954, but is subject to a proviso viz.

> "Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State."[113]

This proviso makes it clear that the 'title deed' of India to Kashmir does not authorise the Government of India to dispose of the territory of Kashmir without the consent of the Government of Jammu and Kashmir. Thus, even if the Government of India wants to cede the territory of the Jammu and Kashmir State, the Constitution of India forbids it to do so on its own accord. It is true that the constitution can be amended to meet changing situations but it is submitted that even the amend-

111 See Chapter 7 below for discussion of Article 253.
112 *In re. Berubari Union* (1960) 3 S.C.R. 250; see also Chapter 6, p. 147 below.
113 See Chapter 6, p. 168 below.

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ment of the Constitution of India will not apply to Kashmir unless made with the 'concurrence of that Government'.[114]

We have considered in the foregoing pages the constitutional validity of accession and subsequent action by India and Kashmir and shown that it excludes the possibility of a plebiscite for determining the status of Kashmir. To hold a plebiscite in one component part of the Indian Union, implies the possibility of its secession ; the Constitution of India does not permit secession.[115] As the position now stands, the State of Jammu and Kashmir cannot secede from the Union of India without an abrogation of the Constitution of Jammu and Kashmir, 1957.[116] Because of the constitutional limitations imposed by Article 253 of the Constitution of India, India cannot cede the state of Jammu and Kashmir. This position brings one to the conclusion that to hold a plebiscite would be repugnant to the Constitution of India and Kashmir.

(5) 'THE KASHMIR CONSPIRACY CASE AND ACCESSION'[117]

In the *Kashmir Conspiracy Case*, Sheikh Abdullah and 25 others, ten of whom were in hiding or in Pakistan, were charged with conspiracy to "overawe by force and show of force the duly constituted Government of the State of Jammu and Kashmir, with the object of overthrowing it and facilitating annexation of the State's territory by Pakistan".[118]

Sheikh Abdullah, the former Prime Minister of Kashmir, was dismissed and detained under the State Preventive Detention

114 Proviso to Article 368 read with Clause (1) of Article 370, Constitution of India.

115 Gledhill, Alan, *op. cit.*, p. 72.

116 Section 3, *Constitution of Jammu and Kashmir*. See Ch. 7, pp. 248-51.

117 The case has since been withdrawn.

118 Quotations from:
'*Guardian*', London, 19th September, 1962; '*The Observer*', London, 16th September, 1962 and '*The Times*', London, 20th September, 1962, unless otherwise stated.

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Act on August 9, 1953.[119] He was released in January 1958, but rearrested in April, 1958, for allegedly making inflammatory speeches.

The prosecution case was that no sooner was Sheikh Abdullah arrested in 1953 than he began to orgauise a conspiracy through letters smuggled by 'his wife and other visitors'. The conspirators are alleged to have been in contact with Pakistani intelligence agents and secured from them money, typewriters, printing machines, arms, hand grenades, and other explosives. The prosecution evidence rests on witnesses and on letters written to the accused and which have been seized. They claim that the letters were written in a simple code.

Mr. Dingle Foot, Q.C., represented the defence. The defence case was not merely a repudiation of the charges but a vigorous counter-attack. As for the prosecution evidence, the defence claimed that the entire case had been fabricated with the use of forged documents and corrupt witnesses.

The final charges were brought against Sheikh Abdullah and the others on August 31, 1962, in the court of Mr. Justice N.K. Hak. The case was then committed for trial by the Special Session Court, Jammu. The first prosecution witness gave his evidence on September 19.

Sheikh Abdullah, in his defence statement after pleading 'Not guilty' said:

> "This is a political trial. I and my friends have been detained over many years, and we are here today, because of the principle for which we have stood, the right of the people in Jammu and Kashmir State to be masters of their own destiny."[120]

Sheikh Abdullah maintained that, ever since his arrest in 1953, "the ultimate decision with regard to the future affiliation of the State vests with the people and can only be achieved by

119 For 'Dismissal of Sheikh Abdullah', see Chapter 5, p. 154 and Chapter 8, Section 1, post.

120 'Sheikh Abdullah on Trial' in *The Economist*, London, September 15, 1962.

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allowing them to exercise the right of self-determination"[121] under impartial international supervision.

In 1948, Sheikh Abdullah while addressing an Id gathering in Kashmir remarked:

> "Our decision to accede to India is based on the fact that our programme and policy are akin to those followed by India." (*Hindustan Times*, New Delhi, October 16, 1948).

A few months before this address he had declared:

> "We, the people of Jammu and Kashmir have thrown our lot with the Indian people, not in the heat of passion or a moment of despair, but by deliberate choice." (*National Herald*, Lucknow, June 19, 1948).

Prima facie, the attitude in his words spoken in 1948 is irreconcilable with that adopted in the statement quoted above, which he made in his defence. A point raised by Sheikh Abdullah in his defence is that the accession of Kashmir to India is not final and that it has to be finally determined by the people of the State. It is this point which the present writer wishes to examine.

No one who is well versed in the political history of the State of Jammu and Kashmir, can ignore the role of Sheikh Abdullah, a great leader of Kashmir in the development of its constitution. "The modern political history of Jammu and Kashmir is synonymous with the life-story of Sheikh Mohammed Abdullah. From 1931 onward, he more than anyone else, reflects the hopes and aspirations of the people of the State."[122]

I have examined the events leading to the accession of Kashmir to India and have examined the validity of the accession. I have found that the act of accession was legal and constitutional.

121 Abdullah, Sheikh Mohammed, *The Kashmir Issue—Statement to the Press*, 17th February, 1958. (Publishers not known. Printed copy of the Statement received through the courtesy of *High Commission of Pakistan, London*).

122 *The Statesman*, Calcutta, June 11, 1946.

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It was a Constitutional Act of the Sovereign British Parliament which gave the power to sign the Instrument of Accession to the Ruler in his own discretion. If the accession of Kashmir could be reopened, the same reopening would imply going back 32 years and reopening the whole question of independence of India and Pakistan, for the same document as provided for the accession of the Princely States, granted independence to India and Pakistan.

Although in *Virendra's case*[123] the Supreme Court of India has held that the courts cannot enquire into the competency of the Ruler to sign the Instrument of Accession, let us, for the sake of an argument, assume that a court in Kashmir upholds Sheikh Abdullah's plea that the people of the State of Jammu and Kashmir have the right to finally determine the future status of Kashmir. We shall now consider its effects and implications.

If the people decide to remain independent with friendly relations with both India and Pakistan,[124] it would mean that the State has to secede from the Indian Union but as the position stands at the time of writing this thesis, secession of a State from the Union is not possible.[125] Also, Section 3 and Section 147 of the Constitution of Jammu and Kashmir, have by reasons of the legislatures inability to amend them sealed the doors of secession for the State from the Union. The pronouncement of the Judicial Committee of the Privy Council in *Trethowan's case*[126] safeguards this rigidity in the Constitution of Jammu and Kashmir. We have seen in the preceding pages that the Government of India cannot legally cede the State of Jammu and Kashmir either.[127] Thus, the future of the State

123 *Virendra* v. *State of U.P.* [1954]. S.C.A. 686 at 699.

124 Bakshi Ghulam Mohammad, the present Prime Minister of Kashmir observed, "Kashmir cannot remain independent. Geographically, the situation does not warrant it at all.... Moreover, Kashmir is a poor state and cannot stahd on her own feet." As quoted by *The Tribune*, Ambala, 17-9-1962.

125 Gledhill, Alan, *The Constitution of India*, p. 72.

126 *A.G. for New South Wales and others* v. *Trethowan* 1932. A.C. 526. See also Chapter 7, p. 248 post.

127 See p. 105 ante.

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stands finalised and within the framework of the Constitution of the Union or the State, it is not possible to consider any other course in this regard.

The Kashmir Conspiracy case came to an abrupt end. Sheikh Mohammed Abdullah and others who had been arrested in that case were released. Some dramatic developments took place thereafter which have great significance in so far as the Constitutional history of the State is concerned.

The Prime Minister of India, Shrimati Indira Gandhi decided to have a dialogue with Sheikh Mohammed Abdullah so as to secure "the active cooperation and involvement of all democratic, secular and progressive forces in the country". As a result of the dialogue, an agreement was arrived at with regard to certain matters between the Prime Minister of India and Sheikh Mohammed Abdullah. This agreement has come to be known as the *Kashmir Accord*. The Prime Minister in the course of her statement made in the Parliament on February 24, 1975 stated:

> "The Agreed Conclusions have been formulated within the framework of the Constitution of India. The constitutional relationship between the state of Jammu and Kashmir and the Union will continue as it has been and the extension of further provisions of the Constitution to the State will continue to be governed by the procedure prescribed in Article 370. There will be no weakening of the ties which exist between the Union of India and its constituent units of which the state of Jammu and Kashmir is one. The existing jurisdiction of the Centre to deal with activities directed towards questioning, or disrupting the sovereignty and territorial integrity of India, or bringing about cession or secession of any part of the territory of India from the Union, will also continue."

She went on to state:

> "Hon'ble members will notice that the question of nomenclature of the Governor and the Chief Minister could not be settled. This is a matter which is provided for in the state

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constitution which at present uses the expressions "Governor" and "Chief Minister". A change in the nomenclature can be made only by amendment of the state constitution by the State Legislature. So far as the Chief Minister is concerned, there should be no objection to the adoption of the designation "Wazir-e-Azam" in the state if the legislature of the state of Jammu and Kashmir amends its constitution accordingly. Until this is done, the present designation would continue.

Sheikh Abdullah was very anxious that to start with the Constitutional relationship between the State and the Centre should be as it was in 1953 when he was in power. It was explained to him that the clock could not be put back in this manner. Mirza Afzal Beg pressed for the transfer of provisions relating to Fundamental Rights to the state constitution, the removal of the supervision and control of the Election Commission of India over elections to the State Legislature, and the modification of Article 356 to require the State Government's concurrence before imposing President's rule in the state. It was not found possible to agree to any of these proposals. I must say to the credit of Sheikh Abdullah that despite his strong views on these issues he has accepted the Agreed Conclusions."[128]

In his letter which he had earlier written to the Prime Minister on February 11, 1975, Sheikh Mohammed Abdullah said:

"The accession of the state of J&K to India is not a matter in issue. It has been my firm belief that the future of J&K lies with India because of the common ideal that we share. I hope you would appreciate that the sole reason for my agreeing to cooperate at the political and govermental levels is to enable the State Government to initiate measures for the well being of the people of the state which I have always considered as my sacred trust. It will be my constant endeavour to ensure that the state of J&K continues to make

128 *Indian Express*, 25th February, 1975.

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its contribution to the sovereignty, integrity and progress of the nation."[129]

Thus, once again the position about the finality of the accession was reiterated.

Following is the text of the agreement reached on November 13, 1974:

"1. The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall in its relations with the Union, continue to be governed by Article 370 of the Constitution of India.

2. The residuary powers of legislation shall remain with the State; however, Parliament will continue to have power to make laws relating to the prevention of activities directed towards declaring questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian national flag, the Indian national anthem and the Constitution.

3. Where any provision of the Constitution of India had been applied to the State of Jammu and Kashmir with adaptations and modifications, such adaptations and modifications can be altered or repealed by an Order of the President under Article 370 each individual proposed in this behalf being considered on its merits; but provisions of the Constitution of India already applied to the State of Jammu and Kashmir without adaptation or modification are unalterable.

4. With a view to assuming freedom in the State of Jammu and Kashmir to have its own legislation on matters like welfare measures, personal law and procedural laws in a manner suited to the special conditions in the State. It is agreed that the State Government can review the laws made by Parliament or extended to the State after 1953 on any matter relatable to the Concurrent List and may

129 As reported in "New Era of Accord hopes Prime Minister".

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decide which of them, in its opinion needs amendment or repeal. Thereafter appropriate steps may be taken under article 254 of the Constitution of India. The grant of President's assent to such legislation would be sympathetically considered. The same approach would be adopted in regard to the laws to be made by the Parliament in future under the proviso to clause 2 of that Article: the State Government shall be consulted regarding the application of any such law to the State and the views of the State Government shall receive the fullest consideration.

5. As an agreement reciprocal to what has been provided under Article 363 a suitable modification of that Article as applied to the State should be made by a Presidential Order to the effect that no law made by the legislature of the State of Jammu and Kashmir, seeking to make any change in or in the effect of any provision of the Constitution of the State of Jammu and Kashmir relating to any of the undermentioned matters shall take effect unless the Bill having been reserved for the consideration of the President receives his assent ; the matters are:

   (a) the appointment, powers, functions, duties, privileges and immunities of the Governor and
   (b) the following matters relating to Elections, namely, the superintendence, direction and control of elections by the Election Commission of India, eligibility for inclusion in the electrol rolls without discrimination adult suffrage, and composition of the Legislative Council, being matters specified in Sections 138, 139, 140 and 50 of the Constitution of the State of Jammu and Kashmir."[130]

It is this agreement which is called the *Kashmir Accord* an

130 "Text of Kashmir Agreement" as quoted in *The Statesman*, dated 25th February, 1975.

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agreement of great political significance in the history of the State.

After the *Kashmir Accord*, an agreement was reached between Congress (I) and the National Conference, with regard to the government of the State of Jammu and Kashmir. Syed Mir Qasim, who was the Congress (I) Chief Minister, of the Jammu and Kashmir State, agreed to step down to enable Sheikh Mohammed Abdullah to form the Government in the State of Jammu and Kashmir. Consequently, Sheikh Mohammed Abdullah was invited by the Governor to form the Government in February, 1975. The Council of Ministers comprised of Sheikh Abdullah as the Chief Minister, Mirza Mohd. Afzal Beg, Shri D D. Thakur (who had resigned as Judge of the High Court of J & K to take up the Cabinet post) and Shri Sonam Narboo (till then India's Ambassador in Outer Mangolia).[131]

The Government of Sheikh Mohammed Abdullah was supported by Congress (I) in the Assembly. Because of the political developments in the rest of the country, in 1977 the Congress (I) withdrew its support to the Government, as a result of which the government fell and on the advice of Sheikh Mohammed Abdullah, the Governor of the State, Shri L.K. Jha dissolved the Assembly and being of the view that there had been a break down of the constitution in the State, assumed the administration of the State to himself and Governor's Rule followed in the State. In the elections which were later on held in 1977, the National Conference returned to power with a 'brutal' majority and once again Sheikh Mohammed Abdullah formed the Government in the State.

There is perhaps no other parallel in the history of the nation, where a Chief Minister of the majority party in the assembly may have stepped down to make room for his political opponent and offer him the Chief Ministership (as had happened in February 1975). It is to the credit of the Prime Minister Shrimati Indira Gandhi and Sheikh Mohammed Abdullah that the experiment worked rather successfully and paved the way for more harmonious and constructive association of the State with the Union of India.

131 Shri Sonam Narboo died in New Delhi on 2nd February, 1980, while still serving as the Cabinet Minister.

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5

The Constitution of India in Relation to Jammu and Kashmir—I

(1) THE SPECIAL POSITION OF KASHMIR IN THE INDIAN UNION

With the accession of the State of Jammu and Kashmir to India, jurisdiction in matters of External Affairs, Defence and Communications was transferred to the Government of India and the Union Parliament was given power to make laws for the State for the purposes of those three matters only. The Union Parliament had no jurisdiction in any other matter. Sovereignty, in so far as the internal administration of the state was concerned, remained with the Ruler. This was provided by virtue of clause 8 of the Instrument of Accession:

> "Nothing in this Instrument effects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument, the exercise of any power, authority and right now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State."[1]

The retention by the States of their sovereignty even after executing the Instrument of Accession and acceding to the Dominion concerned caused a lot of confused thinking. It was

1 For Instrument of Accession, refer to Chapter 4 and Appendix III.

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argued that by acceding to a Dominion, the States lost their independence completely. The supporters of this view maintained that the States could not remain sovereign after their accession even in the limited sense of the word. The Pepsu High Court, set the controversy at rest when in the case of *Gurdwara Sahib* v. *Piyara Singh*[2] their Lordships observed that simply by executing the Instrument of Accession and by 'ceding certain powers with regard to external affairs' a state does not lose its sovereignty, if its powers with respect to internal matters remain unrestricted.

The question, therefore, arises as how far accession restricted the powers of the acceding States. Clause (8) of the Instrument of Accession shows in its opening sentence that the instrument did not in any way effect the 'sovereignty in and over' the acceding State of the Ruler. The Supreme Court of India in the case of *Prem Nath Kaul* v. *The State of Jammu and Kashmir*[3] observed:

> "We must, therefore, reject the argument that the execution of the Instrument of Accession, affected in any manner the legislative, executive and judicial power in regard to the Government of the State, which then vested in the Ruler of the State."

Again, the Supreme Court of India in the case of *Rehman Shagoo* v. *State of Jammu and Kashmir*[4] said:

> "When certain subjects were made over to the Government of India by the Instrument of Accession, the State retained its power to legislate even on those subjects so long as the State law was not repugnant to any law made by the Central Legislature,"

thus holding that there was concurrent power in the State to legislate even on the subjects transferred to the Government of

2 A.I.R. [1913] Pepsu 1.
3 A.I.R. [1959] S.C. 749.
4 A.I.R. [1960] S.C. 1.

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India. The decision in *Sayec* v. *Ameer Ruler Sadiq Mohammad Abbari Bhawalpur*[5] also made it clear that the effect of the Instrument of Accession was not to make any State a part of the Dominion. These pronouncements have now set the controversy at rest.

The internal administration of the State was governed by the *Jammu and Kashmir Constitution Act*, 1939.[6] It was under this Act that Maharaja Sir Hari Singh, appointed his erstwhile adversary, Sheikh Abdullah, in 1947, as the Emergency Administrator for the State.[7]

This appointment was a victory for the people. With the help of his colleagues, Sheikh Abdullah started making drastic changes, giving the people of the State a large share in the administration of the affairs of the State. The people demanded that the Emergency Administration be changed into a Responsible Government and they be given the right to frame their own constitution. Forced by the circumstances and compelled by the public, Sir Hari Singh issued the following proclamation on March 5, 1948:[8]

> "In accordance with the traditions of my dynasty I have from time to time, provided for increasing associations of my people with the administration of the State with the object of realising the goal of full responsible government at as early a date as possible and in pursuance of that object have, by the Jammu and Kashmir Constitution Act of 1996 (Act XIV of 1996), established a Constitutional Government with a Council of Ministers, a Legislature with a majority of elected members and a Independent Judiciary;
>
> I have noted with gratification and pride the progress so far made and the legitimate desire of my people for the immediate establishment of a fully democratic constitution based on adult franchise with a hereditary Ruler from my

5 [1952] 1. All E.R.'326, 328-329.
6 Act XIV of S. 1996 (A.D. 1939).
7 See Ch. 4.
8 *Constituent Assembly* (*Legislative*) *Debates* (India, 1948), Vol. III, p. 1656.

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dynasty as the constitutional head of an Executive responsible to the Legislature;

I have already appointed the popular leader of my people, Sheikh Mohammed Abdullah as the Head of the Emergency Administration;

It is now my desire to replace the Emergency Administration by a popular Interim Government and to provide for its powers duties and functions, pending the framing of a fully democratic Constitution; I accordingly hereby ordain as follows:

(1) My Council of Ministers shall consist of a Prime Minister and such other ministers as may be appointed on the advice of the Prime Minister. I have by Royal Warrant appointed Sheikh Mohammed Abdullah as the Prime Minister with effect from 1st day of March, 1948.

(2) The Prime Minister and other Ministers shall function as a Cabinet and act on the principle of joint responsibility. A Dewan appointed by me shall also be a member of the Cabinet.

(3) I take this opportunity of giving once again a solemn assurance that all sections of my people will have op portunity of service, both civil and military, solely on the basis of their merits and irrespective of creed or community.

(4) My Council of Ministers shall take appropriate steps, as soon as restoration of normal conditions have been completed, to convene a National Assembly based upon adult suffrage, having due regard to the principle that the number of representatives from each voting area should, as far as practicable, be proportionate to the population of that area.

(5) The Constitution to be framed by the National Assembly shall provide adequate safeguards for the minorities and contain appropriate provisions guaranteeing freedom of conscience, freedom of speech and freedom of assembly.

(6) The National Assembly shall, as soon as the work of

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framing the new Constitution is completed, submit it through the Council of Ministers for my acceptance.

(7) In conclusion I repeat the hope that the formation of a popular Interim Government and the inauguration, in the near future, of a fully democratic Constitution will ensure the contentment, happiness and the moral and material advancement of my beloved people."

This proclamation marked the first definite step towards the establishment of a popular ministry and towards the framing of a democratic Constitution for the State. This was the Constitution for the Council of Ministers, and the State was still to be governed by the Constitution Act of 1939,[9] pending the framing of a new Constitution by the duly elected Constituent Assembly. This proclamation was not willingly made by Sir Hari Singh, who deplored the situation and was opposed to constitutional changes. Once omnipotent, he could not bear degradation to 'constitutional head' of the State, towards the affairs of which he became indifferent. This situation could not continue for long as the people did not tolerate it. So, at last, under pressure from Sheikh Abdullah's Government, but on the pretext of ill health, Sir Hari Singh decided to leave the State "temporarily" in 1949. He, therefore, issued another proclamation of 20th June, 1949:

> "Now therefore I hereby direct and declare", reads the proclamation, "all powers and functions whether legislative, executive or judicial which are exercisable by me in relation to the State and its government including in particular my right and prerogative of making laws, of issuing proclamations, orders and ordinances, or remitting, commuting or reducing sentences and of pardoning offenders, shall during the period of my absence from the State be exercisable by Yuvraj Karan Singh Bahadur."[10]

Though this proclamation purported to have been issued on

9 Act XIV of 1995 (A.D. 1939).

10 As quoted in [A.I.R. (1959) S.C. 749 at p. 754].

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the ground that Sir Hari Singh was leaving the State 'temporarily,' in actual effect it amounted to his abdication and the installation by him of Yuvraj Karan Singh as Ruler of the State. This act of the Maharaja was the last official act before he left the State, never to return.[11]

In 1949, the Indian Constituent Assembly was coming to the end of its task. A large number of Indian States had been represented in the Indian Constituent Assembly from the beginning and had taken their share in the framing of the Constitution. When the States entered the Constituent Assembly, it was envisaged that the States would have separate constitutions for their internal administration. But it soon became clear that the idea of a separate constitution for each State was a "legacy from the Ruler's polity which could have no place in a democratic set up".[12] The Government of India conferred with the States, and after detailed discussions, it became obvious that the subjects of the States desired their Constitutions to form a part of the Indian Constitution. After examining the various aspects, it was decided that the Constitution of India should also contain within itself the Constitution of the States. It was also agreed by the States, and the Union Government that "acceptance of the Constitution... should be by the Rajpramukh or the Ruler, as the case may be, on the basis of a resolution to be adopted by the Constituent Assembly of the States concerned where such a body existed,"[13] and for the other States, the Hon'ble Minister for States explained, "we have, therefore, no option but to make the Constitution operative in three States on the basis of its acceptance by the Ruler or Rajpramukh, as the case may be, who will no doubt consult his Council of Ministers."[14] So the Constitution of India included the constitutions of the "willing" States. The Rulers and Rajpramukhs made the Constitution of India as it was, or with some modifications, operative in their

11 He did not go back to the State and died in Bombay in April, 1961.
12 Government of India, *White Papers on Indian States*, 1950, p. 109.
13 *Ibid.*, p. 110.
14 *Ibid.*, p. 110.

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States by issuing proclamations roundabout the 25th November, 1949.

In June 1949, the Yuvraj, on the advice of his Council of Ministers nominated four representatives to the Indian Constituent Assembly. Unlike those from the other States, Kashmir's representatives, made it clear that Kashmir's association with India would be based 'only' on the terms of the Instrument of Accession. "It was also made clear that, while the accession of the Jammu and Kashmir State with India was complete in fact and in law to the extent of the subjects enumerated in this Instrument, the autonomy of the State with regard to all other subjects outside the ambit of Instrument of accession should be preserved."[15] Under clause (7) of the Instrument of Accession, the State did not commit itself to the acceptance of any future Constitution of India, nor fetter its discretion to enter into agreements with the Government of India under any such future Constitution. Clause (7) reads:

> "Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution."

The Government of Kashmir did not accept the Constitution of India as a Constitution for the State. Despite the accession, the state was still to be governed by the old Constitution Act, 1939.[16] This was because the Government of India had given an undertaking that the people of Kashmir should frame their own Constitution. The Govenment of India could not force the State to accept the Constitution, for that would violate the agreed terms of the association of Kashmir with India. The State had voluntarily surrendered three matters only and the Government of India could not enlarge the sphere of its jurisdiction at its own discretion. So, whereas the Constitution of

15 Government of Jammu and Kashmir, *Kashmir and India—Constitutional Aspect*, p. 15.

16 See Ch. 3.

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India laid down constitutional provisions, not only for the former provinces of British India but also for the other princely States as full-fledged constituent units of the Union, in the case of Kashmir it had to make special provisions to cover that particular case. This was explained by Sri Gopalaswami Ayyangar who moved the Bill for that purpose in the Indian Constituent Assembly. He said, "at present the State is a Unit of a federal State, namely the Dominion of India. This Dominion is getting transferred into a Republic, which will be inaugurated on the 26th January, 1950. The Jammu and Kashmir State, therefore, has to become a unit of the new Republic of India".[17]

During the debate Sri Ayyangar said that the relationship of all the States with the Government of India, till India became a Republic, was based on the Instrument of Accession. But whereas in the case of other Indian States "Instruments of Accession will be a thing of the past in the new Constitution. The States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of Accession for becoming units of the Republic,"[18] it would not be so in the case of Kashmir, since "that particular State is not yet ripe for this kind of integration",[19] due to the special conditions prevailing in Kashmir. "In the first place there has been a war going on within the limits of Jammu and Kashmir State... part of the State is still in the hands of the enemies" and in the second place, "...the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity will be given to the people of the State to decide for themselves",[20] the nature of their Constitution.

After this clarification by Sri Ayyangar, the question of drafting Article 370 (Art. 306-A in the Draft Constitution) was considered. "In these negotiations it was made perfectly clear by the State Government that it was for the Constituent Assem-

17 *Constituent Assembly Debates* (India), Vol. X, No. 10, p. 422.
18 *Constituent Assembly Debates* (India), Vol. X, No. 10, p. 422.
19 *Ibid.*
20 *Ibid.*

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bly of the State to frame the Constitution of the State and that in any provision that may be made in the Constitution of India regarding Kashmir, the basis should be the 'Instrument of Accession' and till the Constituent Assembly of the State consented to accede in any other subject to the Union, the relationship between India and the State should be limited to the subjects specified in the 'Instrument of Accession'.[21]

On this principle, and since the situation regarding Jammu and Kashmir at the United Nations had reached a stalemate, it was decided to have an interim arrangement in the Constitution of India regarding Kashmir. Accordingly, Article 370 was discussed and adopted. The future relations of Kashmir with India were to be governed by this Article, which is clearly based on the Instrument of Accession. Article 238 (Article 211 in the Draft Constitution), which governed the relationship between the Union and other part B States, was not to apply to Kashmir.

The Constitution of India was soon to come into force, so it was necessary to take steps for the enforcement in Kashmir of the provisions of the Indian Constitution applicable there. Legally, the power to issue a proclamation for this purpose vested in the Ruler. But we have seen that the Ruler had abdicated in favour of his son, Yuvraj Karan Singh, on 20th June, 1949, so Yuvraj, acting on the advice of his Council of Ministers issued a proclamation on November 25, 1949, to the following effect:

> "Whereas with the inauguration of the new Constitution for the whole of India now being framed by the Constituent Assembly of India, the Government of India Act, 1935, which now governs the constitutional relationship between this State and the Dominion of India, will stand repealed:
>
> .....
> .....
> .....

21 Government of Jammu and Kashmir, *Kashmir and India—Constitutional Aspect*, p. 4.

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I now hereby declare and direct that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall, in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions ;

That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other Constitutional provisions inconsistent therewith which are at present in force in this State."[22]

In view of the Maharaja's proclamation of June 1949, this proclamation was within the powers of Yuvraj, the sovereign authority in the State.[23]

Thus, we find that the basis of the constitutional relationship of Jammu and Kashmir with India were being changed from those created by the Instrument of Accession to the position under Article 370 of the Constitution of India. This Article covered the case of Kashmir only and gave Kashmir a special status in that the provisions governing the relationship of other part B states did not apply to it.

Kashmir and the Constitution of India

Article 2 of the Constitution of India reads:

"Parliament may by law admit into the Union, or establish new States on such terms and conditions as it thinks fit."

This article empowers Parliament to impose special conditions of membership on a state and suggests that Parliament can also

22 *White Papers on Indian States*, Appendix LIV, pp. 371-2.

23 In the case of *Digambar Sein* v. *Lachman Das* [A.I.R. (1952) J. & K. 7] the Board of Judicial Advisers, the Highest Judicial authority in the State at that time, had observed that the Yuvraj was a 'competent authority' to issue a 'Proclamation'.

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confer special rights and privileges on newly admitted States. The words "*as it thinks fit*"[24] give a discretion to the Parliament to confer a special status on a State since there is "no theory of equality of status"[25] in India. Dr. Shukla suggests that this article "gives complete discretion to the Parliament to confer any status on the new (sic) formed states".[26] The present writer agrees that Parliament has a discretion to confer special status, but submits that it is difficult to maintain that it is an unqualified discretion or even that it is a "complete discretion".[27] The discretion has to be exercised in accordance with the other provisions of the Constitution. It must be based on relevant legal grounds and must not be arbitrary. The article might give a "complete discretion" to the Parliament to admit or not to admit a new State into the Union, but once the State has been admitted, the power of the Parliament to confer a special status on that State is subject to the other provisions of the Constitution. If there are legal or other relevant grounds which make it necessary that a special status be conferred on a particular State, Parliament has power to do that by virtue of this Article. It was by virtue of this Article that special status was conferred on Kashmir in view of the "extraordinary circumstances"[28] through which the State was passing. It was by virtue of this "special status" (under Article 370) that Kashmir did not accept the Constitution of India as a whole and reserved the right to frame its own Constitution,[29] when all other part B States had accepted the Constitution of India in its entirety.

The provisions under Article 370 of the Constitution of India, which covers the case of Kashmir alone, meant a division of sovereignty and that was possible only if the Constitution of India was federal in nature.

The Constitution itself says that India is a "Union or

24 Emphasis mine (ASA).

25 Basu, D.D., *Commentary on the Constitution of India*, Vol. I, p. 55.

26 Shukla, V.N., *Commentary on the Constitution of India*, p. 4.

27 *Ibid.*

28 *Constituent Assembly Debates*, Vol. X, No. 10,p. 422. See page 122 above.

29 Clauses (7) and (8) of the "Instrument of Accession" also permitted it.

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States".[30] The word 'Federation' which was so often used in the Government of India Act, 1935,[31] has not been used even once in the new Constitution of India. Yet, if we look to the very nature of the Constitution, we find that it is not a unitary Constitution but a federal one. Of course, the terms *unitary* and *federal* are not synonymous with *good* and *evil*. In their case no moral judgement is involved at all, although some writers use it in that sense. The present writer submits that the question whether a unitary constitution is better than a federal one or *vice versa* does not arise. There is no idea of comparing the two. Both are the types of constitution applicable in different sets of conditions. Whether a constitution is 'unitary' or 'federal' depends on the pattern on which the Constitution has been drafted. A constitution, if drafted on a pattern which secures to the component units a relatively high degree of genuine autonomy is federal in nature.

On studying the pattern of the Constitution of India, we find that the legislative and executive spheres of the centre and the states have been clearly defined. The centre cannot encroach upon the fields which are within the exclusive jurisdiction of the states.[32] "The essence of federalism," observes Professor Gledhill, "is the existence of a sphere in which the units can exercise executive and legislative authority free of central control".[33] The pattern of the Indian Constitution answers to this definition. The legislative powers of the Union and the State legislatures have been embodied in separate lists. List I or the Union List covers such matters as are essential to the existence of the Union or which require uniform treatment throughout India. The exclusive legislative powers of the states are covered in List II or the State List. The Centre cannot encroach upon that list except when a Proclamation of Emergency has been validly promulgated. "A federal state, in short, is the fusion of several states into a single state in regard to

30 *Constitution of India*, Article 1.
31 26 Geo. 5. Ch. 2.
32 The only exception is by a "Proclamation of Emergency".
33 Gledhill, Alan, *The British Commonwealth: The developments of its laws and constitution*, Vol. 6. *The Republic of India*, London, 1951, p. 92,

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matters affecting the common interest while each component unit enjoys autonomy in regard to other matters".[34]

The framers of the Indian Constitution sought to combine the best features of different constitutions, and one such combination is that in India we have a "federal structure with unitary features".[35] It is a federal structure for all times except in the case of 'emergencies',[36] when it will be open to the Union Government to convert the State temporarily into a unitary State. But this does not mean that the Constitution of India is not federal. The chief characteristics of a federal Constitution are (a) the supremacy of the Constitution (b) the distribution of powers and "...our Constitution, with its distribution of powers and the duties of the Court to guard that, remains normally and basically a federal Constitution, subject to specified exceptions".[37] But these exceptions have also been provided in the Constitution and have not been left to the discretion or choice of the Centre. These can be made only in the national interest. And as such it embodies the principle 'in spite of federalism the nation's interest ought to be paramount'.

India is not a federation, in the same sense as U.S.A. or Australia. In those countries one of the basic principles of federalism is that in no case can the distribution be altered on the notion of one of the parties. India, as we have observed above, has done away with that limitation in the national interest and to ensure national unity in emergencies. A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of state rights. There is no doubt that in India there is a great tendency towards giving more power to the Centre and as Sir Ivor Jennings says that it is a "federation with strong centralising tendency",[38] but this can neither make the Indian Constitution a unitary or India

34 Basu, D.D., *Commentary on the Constitution of India*, Vol. I, p. 12.
35 *Ibid.*
36 Constitution of India, Articles 250 (1); 256-7; 352 and 365.
37 Basu, D.D., *op. cit.*, Vol. I, p. 18.
38 Jennings, Sir Ivor, *Some Characteristics of the Indian Constitution*, 1953, p. 1.

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a "quasi-federation".[39] The term "quasi federation for India is hardly justified".[40]

Though, in India there has been a "centralising tendency" yet in the case of Kashmir it can be argued and maintained that "Patel's process of unionisation was not extended to it".[41]

The relationship of Kashmir with India was initiated on a federal basis and there was a clear "division of sovereignty between the Centre and this State, which is the normal feature of a federation". "Beyond the powers transferred by it" to the Union, "the State enjoyed complete residuary sovereignty".[42]

This arrangement was embodied in Article 370 of the Constitution of India.

(2) ARTICLE 370 OF THE CONSTITUTION OF INDIA

The Constitution of India came into force on the 26th January, 1950. And Article 370 was to cover the case of Kashmir alone. "In view of the special problem with which the Jammu and Kashmir Government is faced, we have made special provisions for the continuance of the State with the Union on the existing basis", declared Sardar Patel, the then Minister for States in India, in the Indian Constituent Assembly.[43]

The 'existing basis' were the basis of 'Instrument of Accession" and the 'special provisions' were embodied in Article 370 of the Constitution of India, which reads as follows:

"*Temporary and Transitional Provisions*"

"(1) Notwithstanding anything in this Constitution:

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

39 Wheare, K.C., *Federal Government*. II Edition, p. 28.
50 Alexandrowicz, C.H., *Constitutional Development in India*, 1957, p. 170.
41 Alexandrowicz, C.H., *op. cit.*, p. 154.
42 Abdullah, S.M., in *Kashmir and India—Constitutional Aspect*, p. 15.
43 *Constituent Assembly Debates* (India), Vol. X, No. 5, p, 163.

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(b) the power of the Parliament to make laws for the said state shall be limited to:

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the aid list as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purposes of this Article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that state;

(d) such of the other provisions of this Constitution shall apply in relation to that state subject to such exceptions and modifications as the President may be order specify:

Provided that no such Order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to the matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

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(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly referred to in clause (2) shall be necessary before the President issues such a notification."

This Article, as had been explained by Sardar Patel, was a device to continue the existing relationship of the Jammu and Kashmir State with the Union of India.

The Article has been described as a "*temporary provision*" in the Constitution. The temporary nature of the Article arises merely because the power to finalise the constitutional relationship between the State and the Union of India had been specifically vested in the Jammu and Kashmir Constituent Assembly. The Constitution of India clearly envisaged the convening of a Constituent Assembly for Jammu and Kashmir State[44] and also provides that whatever modifications, amendments or exceptions that might become necessary either to Article 370 or to any other articles in the Constitution of India in their application to Jammu and Kashmir State were subject to the decision of that Assembly.[45] Therefore, the '*temporary*' provision does not mean that the article is capable of being abrogated, modified or replaced unilaterally. "I would like to make it clear," declared Sheikh Abdullah in the Kashmir Constituent Assembly, "that any suggestions of altering arbitrarily the basis of our relationship with India would not only constitute a breach

44 *Constitution of India*, Art. 370 (2).
45 *Constitution of India*, Art. 370 (2).

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of the spirit and letter of the Constitution, but it may invite serious consequences for a harmonious association of our State with India."[46] In the present context the term '*temporary*' has been used so as to minimise the difficulty in the way of the amendment of the Constitution of India, whenever the necessity arises to abrogate, modify or extend the scope of article 370 by agreement.

Since the State of Jammu and Kashmir became an integral part of India after the execution of the Instrument, therefore, clause (1) (c) of Article 370 provides for the application of Article 1 of the Constitution of India, which defines the territory of India. The State was shown in the Constitution as a Part B State,[47] but the provisions of Article 238, which generally governed the relationship of Part B States with the Union of India, were not applicable to this State.[48] This might appear extraordinary, but it is not irregular, for, unlike the other Indian States, Kashmir did not accept the application of the Indian Constitution in its entirety.

> "The effect of the application of the present article (Article 370) has to be judged in the light of its objects and its terms considered in the contact of the special features of the constitutional relationship between (the) State and India. The Constitution makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself..." observed the Supreme Court of India.[49]

Clause (1) (b) of Article 370 refers to the legislative authority of Parliament over Jammu and Kashmir State. The matters over which the Union Parliament had power to make laws for the State were basically the matters already covered by the

46 *Jammu and Kashmir Constituent Assembly Debates*, Vol. IV, No. 1-3, dated 11 August, 1952.

47 The distinction between part A, B & C States has since been abolished by the *States' Reorganization Act*, 1957.

48 *Constitution of India*, Article 370 (1) (a).

49 *Prem Nath Kaul* v. *The State of Jammu & Kashmir* [A.I.R. (1959) S.C. 749].

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Instrument of Accession, namely, "defence, external affairs, communications and the like matters". The exclusive Union powers in relation to India generally are set out in enumerated items in List I and it was obviously necessary that the items on that list corresponding to the powers surrendered by the Instrument of Accession should be settled by agreement between the President and the Kashmir Government.

Clause (b) (ii) provided for the addition to the matters in the Instrument of Accession with the concurrence of the Government of the State. This provided for subsequent enlargement of the Union power if this were deemed necessary in the interests of the Union or the State.

After this sub-clause follows an explanation of what the "Government of the State" meant viz. "Maharaja of Jammu and Kashmir acting on the advice of the Council of his ministers". In 1952, the Constituent Assembly of Jammu and Kashmir, on the recommendations of the Basic Principles Committee, abolished the hereditary rulership and substituted in its place an elected head, designated Sadar-i-Riyasat.[50] This necessitated the change of the explanation of what the Government of the State meant. Accordingly, the President of India, on the recommendations of the Constituent Assembly of Jammu and Kashmir, modified the explanation to read:

> "*Explanation*: For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office."[51]

This amendment accepted the act of the Constituent Assembly of Jammu and Kashmir abolishing hereditary rulership and substituting an elected head of the State. The people of the State were once again reassured that the Government of India

50 On June 7, 1952, *Jammu and Kashmir Constituent Assembly Debates*, Vol. IV, No. 1-3.

51 Ministry of Law Order No. C.O. 44, dated 15th November, 1952.

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would not encroach on State rights.

According to cl. (1) (c), the only Articles of the Constitution of India which applied of their own force to the State Articles 1 and 370; clause (1) (d) provided that the other provisions of the Constitution of India applicable to the State could be determined by the President of India in consultation with the Government of the State. Exceptions and modifications could be made in the same manner and the provisions could be enlarged too. "Power to modify includes a power to enlarge or add to an existing provision," held the High Court of Kashmir in the case of *Sant Singh* v. *State*,[52] where the question was whether the enlargement of the provisions was valid.

Clause (2) provided that, if the Government of Kashmir recommended to tne President of India an enlargement of the powers of the Union Parliament by including matters other than those referred to in the Instrument of Accession, such recommendations should be placed before the Constituent Assembly of the State. Thus, in effect the power to extend the scope of the Union power or otherwise change the basis of relationship of Kashmir with India was vested in the Constituent Assembly of the State. The arrangement made under Article 370 was to continue until the Constituent Assembly of the State made a decision to the contrary.

Clause (3) provided that the Constituent Assembly could recommend the President of India to abrogate, modify or to make it applicable with exceptions. The President could not, however, take these steps without the previous recommendations of the Constituent Assembly of the State.

It follows from the above discussion of Article 370, that the State though an integral part of India, had a unique position in the Indian Constitution.

At the time of their accession it was made clear to all the Indian States that their internal autonomy would be safeguarded and they would not be obliged to accept the Constitution of India. But whereas other Indian States lost their independence by supplementary Instruments and by agreeing to the settlement of their constitutional position and powers by the Constituent

52 [A.I.R. (1959) J. & K. 35].

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Assembly of India, Kashmir chose to remain a unit of the Indian Federation only on the terms and conditions specified in the Instrument of Accession. The state, if it chose to assimilate its status to that of other Indian states, could do so by a supplementary Instrument of Accession signed by the Sadar-i-Riyasat on the recommendation of the State legislature. It was, however, not considered expedient to do so as the Kashmir Constitution (1957) has enabled the State to make progress more rapidly than the other Indian states and Government of India realises it.[53]

Under Article 370 (1) (ii), the President of India in consultation with the Government of Jammu and Kashmir, issued "*The Constitution (Application to Jammu and Kashmir) Order, 1950*"[54] specifying the matters on which the Union Parlliament would be competent to make laws for the State. This Order, was to govern the constitutional relationship of Kashmir with India after the Indian Constitution came into force on 26th January, 1950.

Article 370 is a self applying Article and applies exproprio vigore without having to depend on any other Article of the Constitution of India for its enforceability. Moreover, clause 3 of the Constitution (Application to J & K) Order of 1950 applied Article 1 and Article 370 to the State of Jammu & Kashmir itself.

Once, Article 370 became applicable and enforceable there is no question of it having ceased to apply only because Article 394 was subsequently deleted. The provisions of the Article continued to remain in force and effective even after the Constitutent Assembly at the State enacted the Constitution of the State.[54a]

What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu & Kashmir and when making such specifications he is also empowered to specify the exceptions. Since, the President makes such specifications, the provisions become applicable to the State with the specified exceptions and modifications.[54b]

53. Dr. Krishanlal Shridhasani, a noted journalist of India wrote in *Amrit Bazar Patrika*, Calcutta, 29th July, 1952: "Nehru wanted to keep Kashmir as free of the Indian Constitution as possible. Insiders know by now that...he has begun to feel that our Constitution is so binding as to impede rapid progress towards economic and agrarian reforms. Thus he found Kashmir in a happier position than the rest of India. He has said that he likes very much the land reforms in Kashmir." (As quoted by Brecher Michael, The Struggle for Kashmir, p. 188).

54 C.O. 10, dated 26-1-50,—*Gazette of India Extraordinary*, dated 26th January, 1950. Reproduced in *White Paper on Indian State* (1950), Appendix LVI.

54a *S. Mubarik Shah Naqashbandi* v. *ITO* AIR 1971 J & K 120.

54b *Kundan Lal* v. *Distt. Magistrate* AIR 1970 J & K 143.

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(3) THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1950

In exercise of the powers conferred by Article 370(1) (ii), the President of India issued the *Constitution (Application to Jammu and Kashmir) Order, 1950*,[55] in consultation with the Government of Jammu and Kashmir and specified the matters with respect to which the Union Parliament would be competent to make laws for the said State. The subject-matter of the Order related mainly to the elaboration of the subjects already specified in the 'Instrument of Accession,' but certain additions were also made. Two schedules were added.[56]

The first schedule related to the jurisdiction of the Union Parliament over the State and enumerated the appropriate items in the Union List of the Seventh Schedule to the Indian Constitution. The power of Parliament to make laws for the state was limited to the matters specified in this schedule. The items were:

(1) Defence: Entries 1 to 6.
(2) Preventive Detention for the reasons connected with defence, foreign affairs and the security of India: Entry 9.
(3) Foreign Affairs: Entries 10 to 22.
(4) Communications: Entries 25 to 31.
(5) Trade and Commerce with foreign countries: Entry 41.
(6) Matters relating to Parliament: Entries 72 to 74.
(7) Union Executive and Supreme Court: Entries 93 to 96.

Some other Entries like those of 'Audit of accounts' (Entry 76) and Railways (Entry 22) were applied with modifications.

The result of the application of this schedule was that both the Concurrent and the State List were made *not applicable* to Jammu & Kashmir State. Also, anything not contained in the first schedule was within the exclusive powers of the State. In effect this meant that the residuary power which in the case of other Indian States vested in the Centre, in the case of Kashmir was to belong to the State.

The second schedule tabulated the provisions of the Constitution which in addition to Article 1 and Article 370, were to apply in relation to Kashmir. The parts of the Constitution of India made applicable to the State were:

Part V: This part deals with the Union Executive. It was made applicable to Kashmir with some exceptions and modifications. The main exceptions related to the powers of the

55 This Order has been repealed by the President's Order of 1954: *C.O. 48*, dated 14th May, 1954. See Chapter 6 below.

56 Paragraph (2) of the Order.

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Supreme Court of India.[57] The Supreme Court had only appellate jurisdiction in Kashmir.[58] The reason for limiting the jurisdiction of the Supreme Court was the existence of a 'Board of Judicial Advisers" in Kashmir, to which the appeals from the "High Court of Judicature" of Jammu and Kashmir State lay. The other exceptions related to the powers of the Comptroller and the Auditor General of India.[59] He had no jurisdiction in the State.

Articles 80 and 81, which deal with the composition of the House of the People and the Council of States was to apply with some modifications, the effect of which was the representatives of Jammu and Kashmir in the Council of States and the House of the People respectively were to be *appointed* by the President of India in consultation with the Government of the State. In the case of other States, the representatives in the House of the People are elected directly by the people and in the Council of States by the Legislative Assemblies of the States. Articles 54 and 55 deal with the election of the President of India by the elected members of Parliament and the Legislative Assemblies. These articles were applied in Kashmir with the modification that the reference to elected members of the House of the People was also to include the 'appointed members' from Kashmir under Articles 80 and 81.

Parts XI and XII: These parts deal with the relations between Union and the States. Part XI was made applicable with some exceptions and modifications, the effect being that legislative power over matters not enumerated in the Legislative List[60] which in regard to other Indian states vested in the Centre, in the case of Kashmir belonged to the State itself. Parliament's power of legislation with regard to the State was limited to the items on the Union List prescribed in the first schedule to this Order. Neither the State List nor the Concurrent List were

57 *Constitution of India*, Articles 133-136, 138, 145 (1) (c).

58 S.C. had original jurisdiction in respect of disputes under Article 131. The Fundamental Rights were not applied in Kashmir so the S.C. had no jurisdiction in respect of these.

59 *Constitution of India*, Articles 149, 150.

60 *Constitution of India*, Article 246.

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applied to the State, so that the question of repugnancy between laws on matters on the Concurrent List could not arise. Although item 14 on the Union List gives Parliament legislative power with respect to agreements and treaties with other countries, yet, since this "...treaty making power cannot be used to do what the Constitution otherwise forbids",[61] therefore, the Union Parliament could not legislate so as to dispose of the territory of the State in accordance with an international agreement. This was so because of the commitment of the Government of India that the power to finalise the future of the State vested in the State Constituent Assembly.[62]

Part XII deals with finance. Articles 266 and 267 which in relation to states other than Kashmir deal with distribution of public moneys between the Consolidated Fund, Public Records and Contingency Funds of the Union and the States and appropriations from them was in its application to Kashmir restricted to the Funds and Accounts of the Union. Article 282 empowering the Union or a State to make grants for public purposes and Article 283 empowering Parliament and a State legislature to make laws regulating the payment, disbursement, custody and account of public monies were similarly restricted so as to apply only to the Union and Parliament in so far as Kashmir was concerned. The taxes, which in other cases were collected by the Union or by the State on behalf of the Union remained exclusively under the State control.[63] The Income Tax department of the State was free from Central Controls. The State had its own Customs Department established during the British period. The collections accounted for a high proportion of State revenue. This department has since been amalgamated with the Indian Excise Department on the initiative of the State.

61 Gledhill, Alan, *Constitution of India*, p. 82.

62 Mr. Nehru, in his Broadcast from the *All India Radio* on 2nd November, 1947, said "We have declared that the fate of Kashmir is ultimately to be decided by the people". (As quoted in "*How They Saw Us: How They See Us*").

63 Articles 268 to 281 which deal with the distribution of the proceeds of the taxes levied outside Kashmir by the Union did not apply to Kashmir.

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So far as the administrative relations[64] were concerned, the power of the Union in regard to Kashmir was severely limited. Article 257 dealing with administrative control of the Union over the States generally, did not apply to Kashmir, with the result that the Union had no powers to give directions to Kashmir to ensure compliance with Acts of Parliament or to ensure that the executive power of the Union was not prejudiced. Nor could the Union give such directions regarding communications which it could give to other States. There was, however, an understanding between the Union and the State, that the State would not act in such a way as to give occasion for the issue of such a direction in the case of a State bound by the Articles.

Part XV: It deals with elections. This was made applicable to the State subject to some exceptions and modifications. Article 324 deals with the 'superintendence, direction and control' of elections. It applied in Kashmir only to the elections of the President and Vice-President of India. The Election Commission of India had no other jurisdiction in Kashmir;[65] elections to the State Legislative Assembly were to be governed by the laws of the State. As has been mentioned, the representatives of the State to the House of the People were to be appointed by the President on the recommendations of the Government of the State and were not to be elected. Articles 325-329, which dealt with election to the Parliament and State Legislatures did not apply to the State.

Part XVI: Contains special provisions regarding Anglo-Indians, Scheduled Castes, Scheduled Tribes and Scheduled Areas. The only provision of this part which was made applicable to Jammu and Kashmir was the provision in Article 330, reserving seats for Scheduled Castes and Scheduled Tribes in the House of the People. But since there were no Scheduled Tribes in the State, therefore, the application of this Article was limited to the seats reserved for 'Scheduled Castes and Areas'. Article 334, which places a time limit on reservation of seats in the House of the People and State Legislature applied only in so

64 *Constitution of India*, Part XI.

65 The jurisdiction has been extended from 1962. See Chapter 6 below.

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far as it related to the House of the People. And Article 335 which calls for special consideration of the claims of Scheduled Castes and Tribes to appointment in the public services was applied only in so far as it related to the Union Services. The provision with regard to the reservation of seats in the State Assembly[66] did not apply to Kashmir. The provisions for the appointment of a Commission to investigate into the condition of Backward Classes or of a special officer for Scheduled Castes[67] did not apply to Kashmir.

Part XVIII relates to the official language. The provisions of this part were to apply only in so far as they related to the proceedings in the Supreme Court or the official language of the Union. No other provisions were applicable to it, which meant that the State language of Kashmir and the language for the proceedings of the State High Court were left to be decided by the Constituent Assembly of the State. The directive for the development of the Hindi language[68] was not made applicable to the State.

Part XIX contains the miscellaneous provisions of the Indian Constitution. Article 361 provides that the President, Governors and Rajpramukhs are not liable to answer in any Court for acts done or purported to be done in the exercise of their official duties. The application of this Article in Kashmir is limited to the acts done by the President. In Kashmir there was no Rajpramukh or Governor. There was a Monarch in Kashmir[69] and though the Constitution did not provide for the protection of the Rulers, the acts of the Ruler could not be questioned by the laws of the State. At the time of this Order there was in force in Kashmir, the Constitution Act, 1939[70] and according to its provisions[71] the acts of the Ruler could not

66 *Constitution of India*, Articles 332, 333.

67 *Constitution of India*, Articles 340 and 338.

68 *Ibid.*, Article 351.

69 Yuvraj Karan Singh was acting as the 'Regent'. In 1954 when the "Sadar-i-Riyasat" was elected after the abolition of the monarchy in the State, Art. 361 was applied to the acts of the Sadar-i-Riyasat also. See Chapter 7 below.

70 Act XIV of 1996 (A.D. 1939).

71 Section 5 of Act XIV of 1996 (A.D. 1939).

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be questioned at all. Article 364 which empowers the President to exclude or modify the application of legislation to major ports and aerodromes was to apply to the State only in so far as it related to the laws made by the Parliament. The President had no power to declare a State law inoperative or modify a law made by the State Legislature. Article 365 which empowered the President to suspend the Constitution of a State on failure to comply with a direction given by the Union was not to apply to Kashmir.

Part XX contains only one Article 368, which sets out the procedure for amending the Constitution. In its application to Jammu and Kashmir State, it is subject to a further proviso, viz.:

> "Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Cl. (1) of Art. 370."

This means that apart from the formalities essential under Article 368, for the amendment of the Constitution in its application to Jammu and Kashmir, there was another formality to be observed viz., that of an Order by the President of India under Article 370 (1) is necessary. The President could make an Order under the said Article only in consultation with the Government of Jammu and Kashmir. This meant that the amendment of the Constitution of India could apply to Kashmir only if the State Government (and later the Constituent Assembly of the State) agreed. This was a safeguard ensuring the continuance of relationship of Kashmir with India on the existing basis. Had this safeguard not been placed, the possibility that the State lost its sovereignty was not ruled out especially because of the "strong centralising tendency"[72] in India.

Part XXI deals with temporary and transitional provisions. The provisions of Article 389 permitting Bills pending in the legislatures of the Dominions, the provinces and the States to continue from the stage reached when the Indian Constitution

72 Jennings, Sir Ivor, *op. cit.*, p. 1.

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came into force, were to apply only in so far as they related to the Bills pending in the Dominion legislature. Article 390 relating to money raised and expenditure incurred between the commencement of the Constitution and 31 March, 1950 only applied in so far as it related to the consolidated funds of India.[73]

Of the nine schedules in the Constitution of India only five were made applicable to the State. Those were: Schedule I which named and determined Part A, Part B and Part C States and their territories; Schedule II which prescribed the emoluments of high officials; Schedule III containing Oaths of offices; Schedule IV dealing with representation in the Council of States and Schedule VIII prescribing recognised official languages.

The provisions of Part XXII dealing with 'short title' in Article 393; the commencement of the Constitution in Article 394 and Article 395 repealing the Indian Independence Act, 1947 and the Government of India Act, 1935, were made applicable to the State.[74]

The parts of the Constitution of India which did not apply to the State included Part III, which deals with the "Fundamental Rights" and is a very important part of the Constitution. Since the residents of Jammu and Kashmir had been recognised as the citizens of India, it might be assumed that they would enjoy the same fundamental rights as are enjoyed by the other citizens of India. But it was not so. They do not enjoy those rights. They had no guaranteed fundamental rights.[74A] This might suggest that there was no security for life and liberty in the State and that cases infringing the recognised democratic liberties were not liable to avoidance for unconstitutionality. But an academic appraisal of the situation would be misleading, for the question must be considered in the context of the extraordinary circumstances prevailing in the State, taking into account the economic, social and political character of the

73 Articles 379-391 repealed by *The Constitution (Seventh Amendment) Act*, 1956, Sec. 29 and Schedule.

74 By The *Constitution (Application to Jammu and Kashmir) Order*, 1954, Articles 394 and 395 were made "not applicable" to Jammu and Kashmir. See Chapter 6 below.

74A Fundamental rights made available to the residents of Jammu & Kashmir. See Chapter 6(6).

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Nationalist Movement in Kashmir. The popular Ministry in Kashmir had decided to abolish the *Zamindari system* and to transfer land to the tiller, without any compensation to the landlords.[75] If the fundamental right to compensation for expropriation under the Indian Constitution had been made applicable to Kashmir, legislation implementing this policy would have been held void for repugnancy to Article 31 of the Indian Constitution. There were other reasons too which did not make it possible to apply the fundamental rights to Kashmir, such as the rights of the State subjects of Kashmir under the State Subject Act, 1927 read with Notification of 1932[76] which forbade outsiders to purchase immovable property in the State and the conditions prevailing after 1947, which made it necessary for the State to have its own preventive detention law. For some time of course there was no such thing as "fundamental rights" in Kashmir.[77]

Part IV of the Indian Constitution defines and declares the Directive Principles of the State Policy. Though they are binding on the Executive and Legislative, they are not capable of being enforced by the Courts. They are declared to be "fundamental in the governance of the country," but they cannot "override the provisions in Part III,"[78] and where a fundamental right may be restricted in the general public interest, legislation to implement a Directive Principle is a *prima facie* restriction in the general public interest. This part of the Indian Constitution was not applied to Kashmir because it was felt that to do so could hamper the work of the members of the Kashmir Constituent Assembly in formulating the Directive Principles for the Constitution of the State. The members of the Constituent Assembly were under an obligation to respect the

75 *J. & K. Big Landed Estates Abolition Act, 1950*, Act XVII of 2007 (A.D. 1950).

76 Notification No. 1-L/84, dated 20th April, 1927 read with State Notification No. 13/L, dated 27th June, 1932.

77 There were no 'fundamental rights' in the Constitution Act of Kashmir, 1939 (Act XIV of 1996) or even the Government of India Act, 1935. However since 1952 some provisions of part III were applied to Kashmir. See Sec. (4) below.

78 *State of Madras* v. *Champakam* [1951] S.C.R. 525.

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manifesto of 1944, which had declared that the people of the State were determined to secure to themselves the right to social welfare and to find the suitable means to achieve it. Since the problems of the people of Kashmir which had an invader on its soil, and which had previously suffered much exploitation at the hands of their favoured immigrants and well to do neighbours, were different from those in the rest of India, it would not have been wise to apply the same principles to both. Whatever concerned India as a whole was embodied in the Constitution of India but whatever concerned the State only was left to be considered by the Constituent Assembly of the State. Despite the unique position in Kashmir, in actual fact, progress towards social security in Kashmir was not markedly different from that in the rest of India. Kashmir, at present, is the only State providing for free education from primary grade to the University level,[79] and the State Government has such principles for its governance.

Part XIV of the Constitution of India deals with the services under the Union and the State. By virtue of Article 238, which declares that the reference to states in part XIV shall be construed as not including the State of Jammu and Kashmir, this part is not applicable to Kashmir. In the State the services are regulated by the Kashmir Civil Services Regulation,[80] which restricts the employment in the States to the 'permanent residents'[81] of the State.

Part XVIII deals with Proclamations of Emergency, a proclamation of general emergency (Art. 352), a proclamation suspending the State Constitution (Art. 356) and a proclamation of financial emergency (Art. 360). In the application of Art. 352 to this State, the President of India had no power to issue a proclamation in case of general emergency arising from internal disturbance.[82] But Kashmir was a part of India

79 Since 1953.

80 See *Jammu and Kashmir Administrative Report*, 1939. Now it has been abolished and I.A.S. Cadre applies to the State.

81 Before 1952. "State Subjects".

82 In America "Extraordinary conditions do not create or enlarge constitu-

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and the power of State's 'defence' had been transferred to the Union, defence is not restricted to defence against declared war; it covers "cases of external aggression short of war"[83] also, and therefore, it was the duty of the Central Government to deal with external aggression. But the President had no power to proclaim an emergency in cases of internal disturbance, for the reason that a part of the territory of the State was under occupation of an enemy with hostile intentions towards the other part of the State also. It was, all the same, expected that if the necessity arose or when the State Government should feel that the Government's functions cannot be carried out due to 'internal disturbance,' it would request the President to issue a proclamation.

Apart from this, the provisions of the Indian Constitution, which enable the President to issue proclamations of emergency on the "failure of Constitutional machinery in the State"[84] empowering the Union to suspend the State legislature and control the State Executive did not extend to Kashmir. So the Union could at no time suspend the legislature of the State nor curtail the powers of the State Executive on the grounds of the "failure of Constitutional machinery". The difficulty of applying such a provision to a State, part of the territory of which was in enemy occupation, is obvious.

However, there was a complete understanding between the State Government and the Government of India that if a situation arose which threatened the national integrity and security, it would request the President to issue such a proclamation also.

From the discussion of this Order, it is evident that the powers of the Union Parliament with regard to this State were extended beyond what was originally surrendered under the Instrument of Accession. No doubt the other Indian States accepted this constitution of India completely. They did so on their own initiative and they were under no obligation to accept for they also had every right to enter into separate arrangements with the

tional powers" [*Schechter* v. *U.S.* (1935) 295 U.S. 495]. President cannot issue proclamations in view of an emergency.

83 Basu, D.D., *Commentary on the Constitution of India*, Vol. II, p. 537.

84 *Constitution of India*, Article 356.

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Dominion concerned. There was nothing irregular in the non-acceptance by Kashmir of the Constitution of India.

The Constitutional relationship of the State in the Union immediately after the inauguration of the Constitution of India was to be governed by the Order of 1950.

In 1950, the situation regarding Kashmir was stabilised by a cease-fire agreement though it left "Pakistan with menacing footholds in Kashmir".[85] The General Council of the All Jammu and Kashmir National Conference passed a resolution on the 27th October, asking for the convening of a Constituent Assembly for the State. The important part of the resolution reads:

> "The General Council recommends to the Supreme National Executive of the people to take immediate steps for convening a Constituent Assembly passed by the adult suffrage and then embracing all sections of the people and all the Constituents of the State for the purposes of determining the future shape and affiliation of the State of Jammu and Kashmir. In this sovereign assembly embodying the supreme will of the people of the State, we shall give ourselves and our children a Constitution worthy of the traditions of our freedom struggle and in accordance with the principles of New Kashmir."[86]

In his proclamation of March 5, 1948, the Maharaja of Kashmir had promised the people of the state to give them the right to have a Constituent Assembly for the purpose of framing a Constitution. Article 370 (2) also envisaged the convening of the Constituent Assembly for the same purpose.

So, now, when the people demanded the convening of a Constituent Assembly, Yuvraj Karan Singh, issued the following proclamation:

> "Whereas it is the general desire of the people of the State of

85 "Kashmir: the pivot" in *Atlantic Monthly* (March 1950, Boston).

86 Government of Jammu and Kashmir, "*How They Saw Us: How They See Us*", p. 20.

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Jammu and Kashmir that an Assembly should be brought into being for the purpose of framing a Constitution for the State."

Whereas it is commonly felt that the convening of the Assembly can no longer be delayed without detriment to the future well being of the State.

"And whereas the terms of proclamation of the Maharaja dated 5th March, 1948 in regard to the convening of a national assembly as contained in clauses 4 to 6 of the operative part thereof do not meet the requirements of the present situation:

I, Yuvraj Karan Singh, do hereby direct as follows:

(1) A Constituent Assembly consisting of representatives of the people, elected on the basis of adult franchise, shall be constituted forthwith for the purposes of framing a Constitution for the State of Jammu and Kashmir;

(2) For the purposes of the said election the State shall be divided into a number of territorial constituencies each containing a population of 40,000 or as near thereto as possible, and each electing one member. A Delimitation Committee shall be set up by the Government to make recommendations as to the number of constituencies and the limit of each constituency;

(3) Election to the Constituent Assembly shall be on the basis of adult suffrage, that is to say, every person who is a state subject of any class, as defined in the Notification No...., is not less than twenty-one years of age on the first day of March, has been a resident in the constituency for such period as may be prescribed by the rules, shall be entitled to register in the electoral rolls of the constituency, provided that any person who is of unsound mind or has been so declared by a competent court, shall be disqualified for registration;

(4) The vote at election shall be by direct and secret ballot;

(5) The Constituent Assembly shall have power to act notwithstanding any vacancy in the membership thereof;

(6) The Constituent Assembly shall frame its own agenda

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and make rules for the governing of its procedure and the conduct of its business.

The Government shall make such rules and issue such instructions and orders as may be necessary to give effect to the terms of this proclamation."[87]

This proclamation was issued on the 1st May, 1951. The elections to the Assembly were completed by August of the same year and on 31st October, 1951, the first meeting of the Assembly was held in Kashmir. Sheikh Abdullah called this day as the "day of destiny. A day which comes only once in the life of a nation".[88] He called the Assembly a "Sovereign Authority"[89] and told the members that whatever they decided had "the irrevocable force of law".[90] He then listed the main objects and functions of the Constituent Assembly as follows:

(1) to frame a Constitution for the furture governance of the country;
(2) to decide about the future of the Royal dynasty;
(3) to decide whether compensation should be paid to the Landowners for the expropriation of the Big Landed Estates, carried out in pursuance of the Land Abolition Act (Act XVII of S. 2007);
(4) to declare its reasoned conclusions regarding accession and the future of the State. He enumerated these alternatives: accession to India; accession to Pakistan or complete independence.[91]

Since the State could not secede from the Union of India, after it had once acceded, therefore, the "reasoned conclusion regarding accession" could only imply the scope of the jurisdiction of the

87 *Gazette of Jammu and Kashmir Extraordinary*, 1st May, 1951.
88 Jammu and Kashmir Constituent Assembly, *Opening address by the Hon'ble Sheikh Mohammed Abdullah to Jammu and Kashmir Constituent Assembly on Nov. 5th, 1951*, p. 1.
89 *Ibid.*, p. 2.
92 *Ibid.*, p. 2.
91 For fulles discussion of 'Accession' see Ch. 4 above.

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Union. If the State desired that it should be completely free of the Indian Union, it could request the President of India to issue an order under Article 370, making both that Article and the Order of 1950, inoperative. But the "Instrument of Accession" could not be abrogated so, if the power in matters of Defence of the State remained with the Union of India, the State could become a protectorate of India. But this was not the desire of the people of Kashmir. The effective leadership in Kashmir, including that at present in gaol, was ideologically unreservedly committed to India.

The other possibility was to request the Union Government to abrogate Article 370 and the 'Instrument of Accession' and to cede the State. Although the Constitution has no provision to enable it to cede the national territory, this, being an inherent power of a Sovereign State, could be exercised by amending the Constitution.[92]

Committees were formed and the Assembly turned to its tasks. By August 9, 1953, it had made the following major decisions:

(i) on the recommendations of the 'Land Compensation Committee,' no compensation should be paid for the expropriation of the Big Landed Estates;[93]

(ii) on the recommendations of the 'Basic Principles Committee':

(a) that the basis of the political set up of the State should be fully democratic;

(b) that the 'Hereditary Rulership' should be abolished and instead there should be an elected Head of the State to be designated as 'Sadar-i-Riyasat';[94]

(c) that the State should have its own flag.[95]

With these decisions two functions of the Assembly were

92 *Berubari Union Special Ref. No. 1* of 1959 to S.C. [A.I.R. (1960) S.C. 845].

93 *Jammu and Kashmir Constituent Assembly Debates*, Vol. II, No. 4, p. 49.

94 On June 7, 1952.

95 On June 12, 1952.

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complete, the future of the Royal dynasty and compensation to the landowners.

The Assembly, however, did not take any decision with regard to the accession, but set up a Committee—"Drafting Committee," for drafting the Constitution for the State.

(4) THE DELHI AGREEMENT, 1952

After the Constituent Assembly of the State had taken important decisions referred to immediately above, it was deemed necessary to receive the Concurrence of the Indian Government. Accordingly, the representatives of Kashmir Government[96] conferred with the representatives of Indian Government and arrived at an arrangement. This arrangement was later on known as the "Delhi Agreement, 1952". The main features of this agreement were:

(i) in view of the uniform and consistent stand taken up by the Jammu and Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State, the Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all States other than Jammu and Kashmir, in the case of the latter they vested in the State itself;

(ii) it was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws for conferring special rights and privileges on the 'state subjects' in view of the 'State Subject Notifications of 1927 and 1932:[97] the State legislature was also empowered to make laws for the 'State Subjects' who had gone to

96 The Kashmir delegation was headed by Mr. M.A. Beg, the then Revenue Minister.

97 Notification No. 1-L/84, dated 20th April, 1927 read with State Notification No. 13/L, dated 27th June, 1932.

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Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir;

(iii) as the President of India commands the same respect in the State as he does in the other Units of India, Articles 52 to 62 of the Constitution relating to him should be applicable to the State. It was further agreed that the power to grant reprieves, pardons and remission of sentences etc., would also vest in the President of India;

(iv) the Union Government agreed that the State should have its own flag in addition to the Union flag, but it was agreed by the State Government that the State flag would not be a rival of the Union flag;[98] it was also recognised that the Union flag should have the same status and position in Jammu and Kashmir as in the rest of India, but for historical reasons connected with the freedom struggle in the State, the need for continuance of the State flag was recognised;

(v) there was complete agreement with regard to the position of the Sadar-i- Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was as such his nominee but the person to be appointed as the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head.[99] The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the State legislature itself instead of being a nominee of the Government and the President of India. With regard to the powers and functions of the Sadar-i-

98 Throughout India there is only one flag and Kashmir is the only State which has its own flag in addition to the Union flag.

99 It is not a written law but it is an accepted convention in India.

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Riyasat the following argument was mutually agreed upon:[100]

"(a) the Head of the State shall be a person recognised by the President of the Union on the recommendations of the Legislature of the State;
(b) he shall hold office during the pleasure of the President;
(c) he may, by writing under his hand addressed to the President, resign his office;
(d) subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;
(e) provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor enters upon his office";

(vi) with regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in view of the peculiar position in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State, the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution or of the Constitution of India as applicable to the State;[101]

(vii) with regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, owing to the existence of the Board of Judicial Advisers in the State, which was the highest judicial authority in the State, the Supreme Court should have only appellate jurisdiction;

(viii) there was a great deal of discussion with regard to

100 Government of Jammu and Kashmir, *India and Kashmir—Contitutional Aspect*, p. 22.

101 It was later on determined in 1954. See Chapter 6 below.

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the "Emergency Powers"; the Government of India insisted on the application of Article 352, empowering the President to proclaim a general emergency in the State; the State Government argued that in exercise of its powers over defence (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to proclaim a general emergency on account of internal disturbance.

In order to meet the viewpoint of the State's delegation, the Government of India agreed to the modification of Article 352 in its application to Kashmir by the addition of the following words:

> "but in regard to internal disturbance at the request or with the concurrence of the Government of the State."

at the end of clause (1).

Both the parties agreed that the application of Article 356, dealing with suspension of State Constitution and 360, dealing with financial emergency, was not necessary.

The facts analysed above make it clear that the State of Jammu and Kashmir enjoys a special position in the Union of India, and this position of the State has been permitted by Article 2 of the Constitution itself. "In arriving at this arrangement", declared Sheikh Abdullah, the then Prime Minister of Jammu and Kashmir, "the main consideration before our Government was to secure a position for the State which would be consistent with the requirements of maximum autonomy for the local organs of the State power which are the ultimate source of authority in the State while discharging obligations as a Unit of the federation".[102]

The Jammu and Kashmir Constituent Assembly discussed

102 Government of Jammu and Kashmir, *India and Kashmir—Constitutional Aspect*, p. 18.

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this arrangement and finally adopted a motion of approach on August 21st, 1952.[103]

The agreement was discussed in the Union Parliament on August 7, 1952 and accepted.[104]

But in spite of all these discussions and decisions in the Kashmir Constituent Assembly, the implementation of the agreement was not forthcoming. This aroused suspicion in the minds of the public about the intentions of the leaders of the government. In the working committee of the National Conference there was sharp criticism of the Government's policy. There was a serious rift in the Cabinet itself. The difference of opinion reached a peak when Sheikh Abdullah, instead of implementing the agreement, started advocating secession, which would make Kashmir an 'independent State'. The people of the State were quick to perceive the danger of such a course for they had seen that the tribal attack in 1947 which had caused much devastation was a direct consequence of Kashmir's isolated position. There were "inflammatory rumours that United States was backing the Kashmir's independence".[105] Sheikh Abdullah was accused both by his colleagues in the Cabinet[106] and by the public outside of trying to create a State for himself. In fact, three members of the cabinet submitted a memorandum to Sheikh Abdullah accusing him of various charges.[107] It soon became obvious that the capacity of the Administration to function efficiently was doubtful. The whole matter was spotlighted when the Sadar-i-Riyasat, who, taking cognizance of the situation, on August 8, 1953, dismissed Sheikh Abdullah

103 *Jammu and Kashmir Constituent Assembly Debates*, Vol. III, Nos. 1-3.

104 *Lok Sabha Debates*, August, 1952.

105 Korbel, Joseph, *Danger in Kashmir*, p. 237; '*New York Times*' of July 5, 1953 wrote that John Fester Dulles supported a solution of this nature. There was no official verification, however. It is true that Adlai Stevenson, U.S. Ambassador in India visited Kashmir in May 1953, but there is no proof of any connection between his visit in May and Sheikh Abdullah's change of behaviour by June 1953. The coincidence is, however, conspicuous.

106 Current Affairs Publication, *Kashmir, August 7—September 17*, New Delhi, 1953, pp. 1-4.

107 *Ibid.*, p. 9.

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from the post of Prime Minister of Kashmir and dissolved the Cabinet.

Wrote Sadar-i-Riyasat, to Sheikh Abdullah:

> "This conflict within the Cabinet has for a considerable time been causing great confusion and apprehension in the minds of the people of the State... . I have been forced to the conclusion that the present Cabinet cannot continue in office any longer and hence I regret to inform you that I have dissolved the Council of Ministers headed by you."[108]

The relevant portion of the Order of dismissal read:

> "I, Karan Singh, Sadar-i-Riyasat, functioning in the interests of the people of the State, who have reposed the responsibility and authority of the Headship of the State in me, do hereby dismiss Sheikh Mohammed Abdullah, from the Prime Ministership of the State of Jammu and Kashmir, and consequently the Council of Ministers headed by him is dissolved forthwith."[109]

On the same day in order to "avoid a political and administrative vacuum", the Sadar-i-Riyasat invited Bakshi Ghulam Mohammad, the erstwhile Deputy Prime Minister, to form the new Cabinet.[110]

On 9th August, 1953, Sheikh Abdullah was arrested at "Gulmarg", a health resort about twenty-eight miles from Srinagar valley, under the State Preventive Detention Act. He was released about four years later in 1958 but was shortly re-arrested on a charge of "*Conspiracy to overthrow the Government*". His followers and well-wishers including the then Revenue Minister were arrested with him. A case against him and a few others was tried in the Court of a Special Magistrate

108 *Ibid.*, p. 7.
109 *Ibid.*, p. 9.
110 *Ibid.* p. 10.

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in Jammu.[111]

A lot of confusion arose on account of Sheikh Abdullah's dismissal, since there had not been any 'No Confidence' motion in the Kashmir Assembly. It is true that a Chief Minister is not generally dismissed, if he enjoys the confidence of the House, but it has also to be accepted that the Head of the State is obliged to ensure the continuance of a stable government and if he has reasonable grounds to believe that the Chief Minister has lost the confidence of the people, or if he is engaged in treasonable activities he must replace him. At the time when Sheikh Abdullah was dismissed and arrested, the Assembly was not in session, so a 'No Confidence' motion could not have been discussed. But, it was important that the new ministry should have a vote of confidence from the Assembly in the first session. Accordingly, the Sadar-i-Riyasat wrote to Bakshi Ghulam Mohammad when inviting him to form the new Cabinet, "the continuance in office of the new Cabinet will depend upon its securing a vote of confidence from the Legislative Assembly during its coming session."[112] The State legislature met on October 5, 1953, and passed a unanimous vote of confidence in the new Cabinet.

The National Conference had earlier approved the change of Government. A Convention of about 400 delegates from the National Conference throughout the State met in Srinagar from September 13-15, 1953 and approved the change of government as 'inevitable in the interest of the country and the national movement,' and expressed complete confidence in the new government, promising their fullest co-operation.[113]

In spite of this some friends of Sheikh Abdullah kept on criticising the new Government. Miss Sarabhai[114] criticised the Government of India for its indifference to the events in

111 *The Kashmir Conspiracy case* was withdrawn from the court by the Government and all the accused were released.

112 *Kashmir August 7—September 17*, p. 10.

113 *Keesing's Contemporary Archives* (1952-54), p. 13236.

114 Sarabhai, Miss Mridula; she was a friend of Sheikh Abdullah and was once the Secretary of the A.I.C.C.

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Kashmir. The present writer submits that since the internal autonomy of the State had been recognised, therefore, the Government of India could not interfere. Moreover, since Article 256 of the Indian Constitution, which empowers the Union government to issue directions to the State Government for the running of administration in the State was not applicable to Kashmir, the Government of India could not intervene in the matter. "This was an internal matter and we did not wish to interfere" replied Mr. Nehru to a question in the Lok Sabha.[115]

In Pakistan, however, the events in Kashmir provoked a wave of indignation. There were accusations against India of having overthrown Sheikh Abdullah, "until then a quisling in the opinion of the Pakistanis"[116] but who, now, through a twist of history not without its "comical aspects" had become a martyr in the struggle of Kashmiris. But this propaganda in Pakistan was met with sharp criticism in Kashmir. In the September Convention of the National Conference the members opposed association with the 'ruling clique of Pakistan' and regretted their behaviour.

Bakshi Ghulam Mohammad immediately upon taking the oath of office, went before the microphone to make a policy statement. In his statement he bitterly deplored the idea of an 'independent Kashmir' under the patronage of the United States of America, which he said "would be a threat to the freedom and independence of Indian and Pakistani people".[117] He praised India with which Kashmir had entered into "indissoluble links".

With his coming into power, the formulation of Constitutional relations between Kashmir and India entered a new phase. The work of the Constituent Assembly started afresh with renewed vigour. 'Advisory Committee on Fundamental Rights and Citizenship' and "Basic Principles Committee" were set up on 20th October, 1953.

The Assembly met on February 6th, 1954, and adopted the

115 *Lok Sabha Debates*, August 10, 1953.
116 Korbel, Joseph, *Danger in Kashmir*, p. 243.
117 *Times of India*, Bombay, August 11, 1953.

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reports of the "Basic Principles Committee on Fundamental Rights and Citizenship," thereby fulfilling one of the major tasks with which it had been charged.

The 'Drafting Committee' presented its report on February 12th, 1954, and the report was adopted on February 15th, 1954.[118] The adoption of this report embodied the ratification of the State's Accession to India.[119]

The Basic Principles Committee reported on the regulations concerning the relations between the State and the Union. The report stated that:

> "In order to enable the Centre to discharge its responsibilities, which devolve upon it under the Constitution, those provisions of the Constitution of India which may be necessary for this purpose should be made applicable to the State in an appropriate manner. While preserving the internal autonomy of the State, all obligations which flow from the fact of accession and also its elaboration, as contained in the Delhi Agreement, should find appropriate place in the Constitution. The Committee is of the opinion that it is high time that finality in this respect should be reached and the relationship of the State with the Union be expressed in clear and precise terms."[120]

As a practical outcome of the Report, the Customs barrier between Kashmir and India was removed as from April 13, 1954, at the initiative of the Kashmir Government. Dr. Rajendra Prasad, the President of India, visited the State in April for the first time after the ratification of the accession, and in his statement in Jammu he said, "any break in the relationship (of Kashmir with India) was inconceivable".[121]

118 *Jammu and Kashmir Constituent Assembly Debates*, Vol. IV, No. 2.

119 According to *The Statesman*, Calcutta. February 17, 1954, of the 75 members, 64 were present and voted unanimously. Of the 11 absent members, six were under detention.

120 *Report of the Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship (1954)*, p. 4.

121 As quoted by Joseph Korbel, *Danger in Kashmir*, p. 245.

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Various decisions taken by the Assembly were transmitted to the Government of India for necessary action.

On May 14, 1954, the President of India, acting under Article 370, issued an Order[122] endorsing the relationship of Kashmir with India as defined in the Delhi Agreement. Although, by this Order, the powers of the Union Parliament in relation to Kashmir were enlarged and most of the provisions of the Indian Constitution were applied to the State, yet, the internal autonomy of the State was not interfered with. This Order also recognised the unique position of Kashmir in the Indian Union. For the internal administration of the state after its accession to India, an 'Interim Constitution' was drawn up to meet the changed situation in Kashmir.

(5) THE INTERIM CONSTITUTION OF JAMMU AND KASHMIR STATE

With the formation of the National Interim Government in Kashmir on March 5, 1948,[123] the existing Praja Sabha became a forum charged with the task of adopting the 'New Kashmir' Constitution.[124] *The Jammu and Kashmir Constitution Act*, 1939[125] was then subjected to a process of repeated modifications through the passing of a number of amendment Acts.

We have seen above that in 1951 was established the Constituent Assembly in Kashmir, which was to exercise the powers of the provisional legislature also. However, before the Constituent Assembly was brought into being, Sri Yuvraj Karan Singh enacted the first Amendment Act to meet the changed situation by virtue of the powers vested in him under section 5[126] of the *Jammu and Kashmir Constitution Act* read with the Pro-

122 *Constitution (Application to Jammu and Kashmir) Order*, 1954, C.O. 48. See Chapter 6 post.
123 See p. 117 ante.
124 Discussed in Chapter 3, p. 68-69 ante.
125 Act XIV of 1996 (A.D. 1939). See Ch. 3 ante for discussion of the Act.
126 See Chapter 3, p. 46 ante.

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clamation of the Ruler of 1949.[127] The purpose of enacting this Amendment Act, *The Jammu and Kashmir Constitution (Amendment) Act*, was to delegate the power of legislation to the Constituent Assembly. Some of the more important changes brought about by the *Jammu and Kashmir Constitution (Amendment) Act*, 2008[128] were:

(1) Section 5 of the Constitution Act (discussed p. 46 ante) pertaining to the inherent powers of His Highness was omitted, so there were no longer any inherent powers of legislation vested in Yuvraj Karan Singh, who was acting as the Ruler of the State in the absence of his father Maharaja Hari Singh.

(2) For Section 7 of the Constitution Act, which dealt with the Constitution of the Council of Ministers and provided that the Council of Ministers shall be responsible to His Highness a new Section 7 was inserted:

> "The Council shall consist of the Prime Minister appointed by His Highness and such other Ministers of the State as His Highness may appoint on the advice of the Prime Minister. The Prime Minister and other Ministers shall be collectively responsible to the Legislative Assembly of the State. The Prime Minister shall be the President of the Council."[129]

This admendment was remarkable because it converted the absolute monarch into a constitutional head. Now the Council of Ministers was to be collectively responsible to the legislature. This feature is the chief characteristic of the Parliamentary system of Government. Ilbert has explained the Parliamentary form of Government as:

127 Proclamation of Sir Hari Singh, 20th June, 1949, see p. 119 ante.
128 Act XVIII of 2008 (A.D. 1951).
129 Act XVIII of 2008 (A.D. 1951), Section 5.

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> "Parliament does not govern, and is not intended to govern. A strong executive government, tempered and controlled by constant, vigilant, and representative criticism is the ideal at which parliamentary institutions aim."[130]

The Kashmir legislature, from now on, set itself to achieve that objective.

(3) The Amendment Act also made provisions for the appointment of the Deputy Ministers.[131] These Deputy Ministers were to be elected from amongst the members of the Legislative Assembly.[132]

(4) Section 12 of the Constitution Act dealing with the powers of the Council of Ministers to make rules for the procedure in the Praja Sabha was also omitted.[133] The power to make rules and standing orders was transferred to the Legislative Assembly.[134]

(5) Another change of importance was the power to summon and prorogue the Legislative Assembly. Under the Constitution Act, this power was vested in His Highness, this amendment Act transferred this power to the Speaker,[135] who was himself elected by the Legislative Assembly.[136]

(6) With the application of the Constitution of India vide the *Constitution (Application to Jammu and Kashmir) Order*, 1950,[137] the Union Parliament had been given the power to legislate on matters which the State had surrendered to the Union by the Instrument of Accession. Therefore, the Legislative powers of the Legislative Assembly in Kashmir were redefined as:

130 Ilbert, *Parliament*, Oxford, 1950, p. 103.
131 Act XVIII of 2008 (A.D. 1951), Section 7 (1).
132 *Ibid.*, Section 7(2).
133 *Ibid.*, Section 9.
134 *Ibid.*, Section 11(3).
135 *Ibid.*, Section 13.
136 *Ibid.*, Section 15.
137 Discussed in p. 149 ante.

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> "Subject to the provisions of this Act the Legislative Assembly may make laws for the whole or any part of the State and for the State Subjects, wherever they may be, except in regard to those matters enumerated in List I in the Seventh Schedule to the Constitution of India with respect to which the Parliament of India has power to make laws for the State."[138]

And thus, the Legislative Assembly was now given the power to legislate on all matters concerning the State and the State Subjects, subject only to the restrictions imposed on it by the Constitution of India. The reserved matters referred to in Section 24 of the Constitution Act were no longer out of the purview of the Legislative Assembly in Kashmir and Section 24 was henceforth omitted from the Act.[139]

(7) The Amendment Act also brought about a change in the tenure of the judges of the Jammu and Kashmir High Court. They were to hold office till they attained the age of 60 years as against 55, provided under Section 49 of the Constitution Act.[140]

(8) A judge of the High Court could no longer resign by submitting his resignation to the Prime Minister as clause (a) to Section 49 of the Constitution Act was omitted. However, the Amendment did not lay down any provisions as to the method for the resignation by a judge of the High Court. It was only in 1952, vide *The Jammu and Kashmir Constitution (Amendment) Act*, 2009,[141] that it was laid down that a judge of the High Court could resign by writing under his hand addressed to the Sadar-i-Riyasat. From 1951 to 1952, there remained a *lacuna*.

138 Act XIV of 1939, Section 20.
139 *Ibid.*, Section 21.
140 Act XIV of 1939, Section 35.
141 Act XV of 2009 (A.D. 1952).

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The next Amendment Act was passed by the Constituent Assembly acting as the legislature for the State in 1952 and was styled *The Jammu and Kashmir Constitution (Amendment) Act*, 2009.[142] The main reason for the passing of this Act was the momentous decision of the Constituent Assembly[143] to abolish the Dogra dynasty, which had ruled the State of Jammu and Kashmir for about 100 years since 1846.

By this Amendment Act, Schedule I of the Constitution Act, 1939, was replaced by another Schedule containing the provisions with regard to the Head of the State. It provided that the Head of the State shall be *elected* by the State legislature and recognised by the President of India. He shall be designated the Sadar-i-Riyasat and he shall hold office for a term of five years from the date he enters upon his office. He shall hold his office at the pleasure of the President of India. No person shall be eligible for election to the office of the Sadar-i-Riyasat unless he is a State Subject of Class 1,[144] and has completed the age of 21 years on the date of filing the nomination paper. He should be a person capable of being elected, a member of the Constituent Assembly. The Indo-Kashmir Agreement of July 24, 1952,[145] had accepted the abolition of the dynastic rule in Kashmir. With this Act, monarchy was finally abolished from Kashmir even in name.

Whereas under Section 73 of the Constitution Act, 1939, all revenues and public moneys were to be received for and on behalf of His Highness with the result that there was no distinction between the State revenues and the Maharaja's wealth, under this Amendment Act a distinction was drawn between the revenues of the State and the private income of the Head of the State, by providing:

> "All revenues and public moneys raised or received by or on behalf of the Jammu and Kashmir Government shall be

142 Act XV of 2009 (A.D. 1952).
143 *Jammu and Kashmir Constituent Assembly Debate*, 12th June, 1952.
144 For discussion of State Subject, see Ch. 7 post.
145 See section 4 ante.

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received for and credited to the account of the Jammu and Kashmir State."

As such the revenues of the State were now clearly defined.

The Jammu and Kashmir Constitution Act, 1939, was once again subjected to amendment in 1954 by the *Jammu and Kashmir Constitution (Amendment) Act*, 2011.[146] This was the last Amendment Act to the Constitution of 1939, which was finally repealed by Section 157 of the Constitution of Jammu and Kashmir in 1957. The Amendment Act came into force from 14th May, 1954, the same date as the *Constitution (Application to Jammu and Kashmir) Order*, 1954, was issued by the President of India.[147] The main changes introduced by this Amendment Act were:

(a) new provisions with regard to the 'permanent residents'[148] were introduced and the term 'State subject' was omitted;

(b) clause 2 of Section 56 of the Constitution Act was modified; the original jurisdiction of the High Court in respect of Civil suits and proceedings was extended to enable it to entertain civil suits of a value of Rupees Twenty Thousand instead of Ten thousand originally;

(c) His Highness's Board of Judicial Advisers[149] was abolished, all appeals and proceedings pending before the Board were transferred to the Supreme Court of India;[150]

(d) Section 75 of the Constitution Act, 1939 which made the Council of Ministers the final interpretor of the Constitution, was deleted from the Constitution;

(e) with a view to giving advisory jurisdiction to the High Court, a new Section 66-A was inserted:

"If at any time it appears to the Council that a

146 Act XLVII of 2011 (A.D. 1954).
147 See Chapter 6 post.
148 Permanent residents have been discussed in Ch. 7 post.
149 Discussed in Chapter 3, p. 62 ante.
150 See Chapter 6 post.

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> question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the High Court upon it, it may refer the question to that Court for consideration and the court may, after such hearing as it thinks fit, report to the Council its opinion thereon."

The words 'and the court may', presumably give an option to the High Court to refuse to exercise this jurisdiction. However such a situation has not yet arisen.

The Amendment Acts referred to above were passed to cope with the changed conditions in the State of Jammu and Kashmir. These were also intended to achieve the objective enunciated in the 'New Kashmir' plan which called for a responsible ministry.

The Constitution Act, 1939, with these various amendments served as the 'Interim Constitution' of the Jammu and Kashmir State, pending the enactment of a fully democratic Constitution by the State Constituent Assembly.[151]

151 The Jammu and Kashmir State's Constitution as framed by the Constituent Assembly was adopted in 1957. See Chapters 7 and 8.

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6

The Constitution of India in Relation to Jammu and Kashmir—II

The *Constitution (Application to Jammu and Kashmir) Order*, 1954,[1] deals only with the Constitutional position of the State of Jammu and Kashmir within the framework of the Indian Constitution ; the internal Constitution of the State itself was framed by the Constituent. Assembly of Jammu and Kashmir, convened for the purpose in November 1951.

The bulk of this Order relates to the implementation of the 'Delhi Agreement' of 1952, discussed earlier.[2]

According to this Order, which was made by the President of India with the concurrence of the Government of Jammu and Kashmir, in exercise of the powers conferred on him by Clause (1) of Article 370 of the Constitution of India, the jurisdiction of the Union Parliament was extended from the original three subjects of 'Defence, Foreign Affairs and Communications' to *all* subjects on the Union List,[3] subject to some exceptions and modifications. The autonomy of the State was not interfered with, and consequently matters which concerned the internal administration of the State were left to be incorporated in the

1 *C.O. 48*, published with the Ministry of Law Notification No. S.R.O. 1610, dated the 14th May, 1954. *Gazette of India* (Extraordinary), Part II, Section 3, p. 821.

2 See Chapter 5, Section 4 ante.

3 *Constitution of India*, Seventh Schedule, List I.

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State's own Constitution. The State of Jammu and Kashmir was assured political stability by according constitutional validity to its association with the Union of India.

This Order superseded[4] the *Constitution (Application to Jammu and Kashmir) Order, 1950*[5] and defined precisely the scope and extent of the limitations on States sovereignty, consequent upon its accession to India. The Constitution (Application to Jammu and Kashmir) Order, 1954 was first amended in 1956 by C.O. 51, dated 11-2-1956, then by C.O.[55 and by C.O. 56 in 1958. In 1959 it was amended by C.O. 57 and C.O. 59. Again, in 1960 by C.O. 60 and C.O. 61. It was further amended in 1961, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1971, 1972, 1974, 1975, 1976 and 1977 by C.O. Nos. 62, 66, 69, 70, 71, 72, 74, 75, 76, 77, 79, 80, 83, 85, 86, 89, 91, 92, 93, 94, 95, 97, 98, 100, 101, 103, 104, 105, 106 and 108 respectively. The effect of all these amendments has been to bring the position prevailing in the State more at par with the rest of the country and further strengthen the bonds of harmonius association of the State with the rest of the country.

(1) TERRITORY

By the application of Article 1 of the Constitution of India, which declares the name and territory of the Union, Jammu and Kashmir State forms a part of the territory of India. At the time of the inauguration of the Constitution of India in 1950, Kashmir was included as a part B state. But the distinction between part A, B and C states has since been abolished[6] and India now comprises Fifteen States.[7] Jammu and Kashmir is shown as the 15th State in the Constitution.[8] Its status, however, for the reasons mentioned in Chapters 4 and 5, differs from the other Indian States.

4 *See C.O. 48*, Section (1)(b).
5 *C.O. 10* of 1950, see Ch. 5 ante.
6 By the *States' Reorganisation Act, 1956*.
7 By the *States' Reorganisation Act, 1956*, there were created 14 States. In 1960, by the *The Bombay Reorganisation Act, 1960* Bombay was divided into Gujrat and Maharashtra, [and the total number of States in India rose to 15. Now there are 25 States.
8 First Schedule.

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In the case of Indian States other than Kashmir, the Union Parliament has power to alter the name, area or the boundary of any state, provided that a Bill for the purpose has been introduced in the Union Parliament on the recommendations of the President of India.[9] The only formality for such an act is that the President is obliged to ascertain the wishes of the States to be effected. He is, it must be understood, required merely to ascertain the wishes, he need not abide by them. Moreover, even if a Bill is introduced in the Parliament without the previous recommendation of the President, the Constitution provides[10] that the President's subsequent assent is enough to validate the law.

In the case of Jammu and Kashmir, this power of the Parliament under Article 3 to alter the name, area and boundaries of a State has been subjected to a limitation by virtue of a proviso to the Article:

> "Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in the Parliament without the consent of the Legislature of that State."[11]

The words used in this proviso are "Consent of the legislature of that State" so that unless the State legislature *consents* to the introduction of a Bill seeking to increase, diminish or change the name or alter the boundary of the State of Jammu and Kashmir, no such Bill could be introduced in the Parliament. Moreover, Article 255, which makes subsequent assent to a Bill a protection from invalidation of a Bill for want of previous sanction of the

9 *Constitution of India*, Article 3. By the *Assam* (*Alteration of Boundaries Act* (Act XLVII of 1951) the boundaries of the State of Assam have been altered on account of the cession of a strip of territory by India to Bhutan. By the *Andhra State Act* (Act XXX of 1953) a new State of Andhra has been created. By the *Constitution* (*Ninth Amendment*) *Act, 1960*, the Berubari Union has been ceded to Pakistan.

10 *Constitution of India*, Article 255.

11 *Constitution* (*Application to Jammu and Kashmir*) *Order, 1954*; *C.O. 48*, Section 2(2). (Hereinafter referred to as *C O. 48* in this thesis).

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President to the introduction of such a Bill is not applicable to Kashmir,[12] with the result that Bills which require previous sanction or recommendation under the Constitution can only be introduced when such sanction or recommendation has been granted. Failure to comply with this provision will invalidate the law in so far as the State of Jammu and Kashmir is concerned and the subsequent assent of the President will not help. Moreover, it will not only be necessary to ascertain the wishes of the State legislature, but the President of India will be obliged to accept the decision of the majority in the State legislature. So if the necessity arises to alter the boundary or change the name or area of the State, the State legislature must recommend to the Parliament to enact the necessary legislation, as it cannot do so of its own accord. The process, no doubt, is cumbersome, but if the internal autonomy of the State is to be maintained the safeguard becomes inevitable. India has assured the maximum autonomy to the State and the Constitution has validated it. "It is a part of our Constitution that we cannot touch Kashmir without the consent of Kashmir's elected Assembly", reaffirmed Mr. Nehru, the Prime Minister of India in 1961.[13] This being so, the power of the Union Parliament to dispose of the territory of the State in consequence of an international agreement or treaty, under Article 253 is also limited in regard to Kashmir. No Bill effecting the disposition of the State of Jammu and Kashmir is valid unless passed with the previous consent of the State Government.[14] And indeed in the words of Professor Gledhill, "the treaty making power cannot be used to do what the Constitution otherwise forbids".[15] It is interesting to note that Section 106 (1) of the Government of India Act, 1935 read:

> "The Federal Legislature shall not, by reason only of the entry in the Federal Legislative List relating to the implementation of treaties and agreements with other countries, have

12 *C.O. 48*, Section 2(6)(g).
13 *Amrit Bazar Patrika*, Calcutta, 10-10-1961.
14 See p. 169 below.
15 Gledhill, Alan, *Constitution of India*.

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power to make any law for any province except with the previous consent of the Governor."

Also, as the Judicial Committee held in *Attorney-General of Canada* v. *Attoney General of Ontario*,[16] "the Dominion (of Canada) cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the Constitution which gave it birth....". And the proviso to Article 11 of the Indian Constitution explicitly denies power to the Union Parliament to dispose of the territory of the State without the consent of the Government of that State. It should be noted that unlike the proviso to Article 3, which requires *consultation with the legislature* of the State before affecting any change in area, name or boundary, the proviso to Article 253 requires the *consent of the Government* of that State.

The territory of the State of Jammu and Kashmir has been defined by the *Constitution (Seventh Amendment) Act, 1956*, as:

"The territory which immediately before the commencement of this Constitution, was comprised in the India State of Jammu and Kashmir."

Thus, the territory includes the area of the State at present held by tribesmen and which is not *de facto* under India's control.

The Security Council has recognised the sovereignty of the Government of Jammu and Kashmir over the *whole* area, as in its resolution of January 13, 1948,[17] it said that the Plebiscite Administrator would derive his authority for conducting the plebiscite in the State of Jammu and Kashmir (which includes the area in the hands of tribesmen) from the Government of Jammu and Kashmir. Also, as Ferguson remarks, "it was the whole State of Jammu and Kashmir that acceded to India, and although some regions had broken away, they had done so illegally, and their illegal action could not confer any right on Pakistan".[18]

16 (1937) A.C. 326.
17 *United Nations Year Book*, 1948.
18 Ferguson, James P., *Kashmir—an Historical Introduction*, p. 91.

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(2) DISTRIBUTION OF POWERS BETWEEN KASHMIR AND INDIA

(i) Centre and States

The essence of a federal Constitution is the division of powers between the Centre and the States. Keeping this essential nature of a federal polity in mind, the characteristic of the distribution of powers becomes apparent. The exact line which is drawn between matters of common concern to the whole of the federation and matters which concern the States individually to a very large extent depends upon the views adopted by the federating States.

In the United States of America, when the States agreed to form a federation, they grudged any surrender to the centre and were careful to grant it only enumerated powers. Powers which were not granted to Congress and not prohibited to the States were and remained with the States.[19]

When the Indian Constitution was being framed, the Founding Fathers had before them the example of the working of the American Constitution, which they did not find in all respects suitable to the conditions prevailing in India. Since the scheme of the distribution of powers in each federation is determined by the peculiar political conditions existing at its creation, in India the need for a strong Centre was accepted and consequently the residual powers of legislation were vested in the Centre and not the States.[20]

The scheme of the distribution of powers under the Constitution of India is a direct legacy of the Government of India Act, 1935. The legislative fields of both the States and the centre have, however, been enlarged and in the words of Professor Wheare the enumerations made in the Constitution of India are "more complete than anything attempted in the four federations".[21]

The total number of matters dealt with under the Government

19 *Constitution of United States of America*, 10th Amendment.
20 *Constitution of India*, Article 248.
21 Wheare, K.C., *Federal Government*, 3rd edition (1953), p. 81.

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of India Act, 1935, was 153; the Federal List contained 61 items, the provincial list 56 items and the concurrent list 36 items. In the Constitution of India (1950) there are in all 210 items. The Union (corresponding to Federal) list has 97, the State (corresponding to provincial) list 66 and the concurrent list 47 matters. These entries are designed to define and delimit precisely the respective spheres of legislative jurisdiction of the States and the Union Legislature. These entries are not "powers of legislation" but "fields of legislation"[22] and these "should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation" [23]

Another improvement on the scheme of the distribution of powers under the Government of India Act, 1935 which has been made in the present Constitution of India relates to legislative capacity in fields not enumerated in the lists. Under the Act of 1935, the residuary power of legislation could be assigned to the States or the Centre at the discretion of the Governor-General;[24] under the present constitution it falls within the exclusive jurisdiction of the Union Parliament.[25]

However, the State of Jammu and Kashmir stands out as the only State in India which is not governed by this general scheme; a departure has been made in view of the special circumstances in which the State was placed. The division of functions between the Central Government and the Government of Jammu and Kashmir was arrived at on an objective consideration of what powers ought to belong to which government; it is based on Article 370 of the Constitution of India and the *Instrument of Accession*. We have seen in the last chapter that the basis of relationship of Kashmir with India was the guarantee of maximum autonomy to the State and the formal acceptance by the Union Government that "...it is up to the people of Kashmir... to transfer more powers for mutual advantage to the custody

22 *Govindi* v. *State of U.P.* [A.I.R. (1952) All. 88].
23 *Shri Ram Ram Narayan* v. *State of Bombay*. [A.I.R. (1959) S.C. 459].
24 *Government of India Act, 1935*, Section 104.
25 *Constitution of India (1950)*, Article 248.

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of the Union".[26] Matters like Defence, External Affairs, Communications, Currency, Immigration, Passport and visas were of necessity assigned to the Central Government by the State Government but matters not enumerated in the Union list are retained by the State.

Since the State of Jammu and Kashmir belongs to the same class as Punjab or Rajasthan,[27] the departure made in its case might appear to be a violation of the principle of *equality before law*. But when we view the relationship in its right perspective, we do not find it to be so. "The Constitution of India applies to the State of Jammu and Kashmir not *proprio vigore* but by virtue of the Instrument of Accession and subject to its terms and conditions",[28] and one of the conditions of the Instrument of Accession was that the State was not obliged to accept 'any future constitution of India'.[29] Thus, whereas all the States other than Kashmir merged into the Union and adopted the Constitution of India, Kashmir did nothing of the kind and its relationship continued to be based on the Instrument of Accession; the relationship of Kashmir with India was bound to be different from that of the other Indian States. The Constitution of India itself provides for the application of different terms and conditions to different States. There is no constitutional guarantee of equality of treatment of all the States under the Indian Constitution.[30] Hence, the departure made in the case of Jammu and Kashmir in the distribution of powers is not a violation of the principle of *equality before law*.

(ii) The Scheme of Distribution of Legislative Powers

The legislative competence of the Union Parliament extends, subject to the provisions of the constitution, to making laws for the whole of India or any part thereof; and that of the State

26 Government of Jammu and Kashmir, *India and Kashmir—Constitutional Aspect*, p. 19.

27 *Constitution of India*, Article 1.

28 Sen, D.K., *A Comparative Study of the Indian Constitution*, Calcutta, 1960, Vol. 1, p. 115.

29 *Instrument of Accession*, Clause 8. See also Ch. 5 ante.

30 *Constitution of India*, Article 2; See Ch. 5, Sec. 1-3.

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legislature to making laws for the State or any part thereof. No law made by Parliament shall be deemed to be invalid on the grounds that it would have extra-territorial operation.[31]

Thus, within the ambit of the specified powers, Parliament is supreme and does not recognise any fetters on its powers except those which are laid down in the Constitution itself. Its competence extends to making laws which may have extra-territorial operation and, even if its provisions are unenforceable outside India, that is no argument against Parliament's power to enact it.

Article 246 of the Constitution, dealing with the distribution of legislative subjects provides:

> "(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this constitution referred to as the "Union List").
> (2) Notwithstanding anything in clause (3), Parliament and subject to clause (1), the legislature of any state also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this constitution referred to as the "Concurrent List").
> (3) Subject to clauses (1) and (2), the legislature of any State has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this constitution referred to as the "State List").
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter in the State List."

As such, we find that Parliament has exclusive power to make laws for the whole or any part of the territory of India with respect to matters in the Union List. Parliament and the legislature of

31 *Constitution of India*, Article 245.

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a State have concurrent powers to make laws with respect to matters enumerated in the Concurrent List, while the legislature of a State has exclusive powers to make laws with respect to matters in State List. The scheme of Article 246 is the same as that of Section 100 of the Government of India Act of 1935, under which it was held[32] that when the three lists come into conflict, "List I has priority over List III and II, and List III has priority over List II".

Under clause (4) of Article 246, Parliament has power to make laws with respect to any matter for *any* part of the territory of India, even if such a matter is a matter included in the State List, provided that the territory to which such law would extend has not been included in the territory of any State This clause would cover the cases of new acquisitions.[33] Notwithstanding that Article 249 and Article 250 (3) restrict the power of a State legislature to the territory of that State, the legislature of a State has power if there is sufficient nexus between subject matter of a State law and the territory of the state, notwithstanding its extra-territorial application the statute must be upheld,[34] but if there is no such territorial nexus, the impugned provisions of the Act are *ultra vires* the State Legislature.[35]

In its application to Jammu and Kashmir State in Article 246, the words, brackets and figures "Notwithstanding anything in clauses (2) and (3)" occurring in clause (1), and clauses (2), (3) and (4) have been omitted.[36]

The result of these omissions is that the legislative competence of Parliament over the State of Jammu and Kashmir extends to the matters enumerated in the Union List, with some exceptions:

(i) Item 8, which deals with the Central Bureau of Intelligence and Investigation is not applicable to Kashmir.

32 *Prafulla Kumar Mukherjee* v. *Bank of Commerce Limited*, Khulna [(1944). 74 I.A. 23 at p. 34].
33 Goa and Nagaland come under these provisions.
34 *State of Bombay* v. *Chamarbaugwal* [A.I R. (1957) S.C. 699].
35 *State* v. *Narayandas* [A.I.R. (1958) Bombay 68].
36 *C.O. 48*, Section 2(6)(a).

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The object was to empower Parliament to establish and exercise legislative control over a Bureau of Intelligence and Investigation, comparable to the American Federal Bureau of Investigation, to collect criminal information throughout India, which the Union Government could communicate to the State Governments so that police could more efficiently deal with criminal activities extending beyond the State frontiers. The exclusion of Kashmir may possibly have serious consequences for India and Kashmir.

(ii) Parliament has no power to legislate regarding preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India,[37] in relation to Jammu and Kashmir, and since preventive detention for other reasons is on the Concurrent List, no law of preventive detention made by Parliament will extend to Kashmir.

Preventive detention of foreign nationals might be regarded as coming within the scope of "Foreign Affairs; all matters which bring the Union into relation with any foreign country".[38] For it inevitably brings the Union into relation with the Foreign Country which is naturally interested in the treatment of its subjects. It has been held that, preventive detention of a foreign national comes within the scope of this item.[39] The Indian Preventive Detention Act does not extend to Kashmir but the Foreigner's Act, 1946, which empowers the Union Government to intern and expel aliens does.

Article 35 (c) of the Constitution of India, excepts the Jammu and Kashmir Preventive Detention Act from the operation of the fundamental rights[40] and as such saves it from being declared void on the grounds that it is inconsistent with the fundamental rights guaranteed by the Constitution of India.

37 *Constitution of India*, Union List, Item 9.
38 *Ibid.*, Item 10.
39 *Hans Mullers* v. *Supdt.* (1955) I, S.C.R. 1284.
40 *Subhan* v. *State* [A.I.R. (1956) J. & K. 1].

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(iii) No Parliamentary law dealing with acquisition or requisition will extend to the State.[41] Originally this field was partly covered by an item on the Union List but is now on the Concurrent List.[42]

(iv) Parliament cannot legislate in Kashmir with respect to the Court of Wards for the Estates of the Rulers of the Indian States.[43]

(v) Parliament may legislate on incorporation, regulation and winding up of banking, insurance and financial corporation but not with respect to Co-operative Societies,[44] nor with respect to trading corporations or non-corporations even if their objects are not confined to one State.[45]

Since the banking, insurance and financial corporations functioning in the State are either branches or delegates of All India Organisations, power to legislate for their creation, management, administration,[46] winding up, merger and amalgamation,[47] must logically vest in the Union Parliament. But corresponding powers in relation to other corporations, whether with interstate objects or not, is within the exclusive power of the State legislature.

(vi) In relation to the rest of India, Parliament is empowered to encroach upon the State powers over industries and mines by declaring that control of a particular industry or regulation of some aspect of mineral development by it is in the public interest, but Parliament cannot declare that the control by the Union of any industry or the regulation of mines, or mineral development in Jammu and Kashmir is expedient in the public

41 *Constitution of India*, Union List, Item 33.
42 *Constitution of India* (*Seventh Amendment*) *Act*, 1956, Sec. 26.
43 *Constitution of India*, Union List, Item 34.
44 *Ibid.*, Item 43.
45 *Ibid.*, Item 44.
46 *Charanjit Lal* v. *Union of India*, [A.I.R. (1951) S.C. 41].
47 *Narayanprasad* v. *Indian Iron and Steel Company Ltd.* [A.I.R. (1953) Calcutta 695 at 699].

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interest.[48] Parliament can legislate with respect to petroleum and petroleum products and other liquids and substances declared by Parliament to be dangerously inflammable[49] and regulate labour and safety in mines and oil fields in Kashmir.[50]

(vii) Laws made by Parliament for censorship of cinematograph films[51] will not extend to Kashmir and all other matters relating to Cinemas already come under the exclusive jurisdiction of the States.[52]

(viii) Parliament cannot legislate in regard to ancient and historical monuments or archaeological sites and remains in Jammu and Kashmir State.[53]

(ix) Parliament cannot legislate with regard to interstate migration or quarantine[54] in regard to Jammu and Kashmir.

We have seen in the last chapter[55] that special position was accorded to the 'permanent residents' of the State particularly in respect to (i) employment in the State, (ii) acquisition of immovable property in the State, (iii) settlement in the State, and so the exclusion of the Union power over interstate migration was essential to safeguard these provisions guaranteed by the Constitution of India itself.[56] The power of the Kashmir legislature over this subject is discussed below.[57]

(x) Parliament cannot legislate on the Constitution organisation and jurisdiction of the High Court of the State,[58]

48 *Constitution of India*, Union List, Item 52.
49 *Ibid.*, Item 53.
50 *Ibid.*, Item 55.
51 *Ibid.*, Item 60.
52 *Constitution of India*, State List, Item 33.
53 *Ibid.*, Union List, Item 67.
54 *Ibid.*, Item 81.
55 Chapter 5 above.
56 *C.O. 48*, Sec. 2(4)(j)(b).
57 See Chapter 7.
58 *Constitution of India*, Union List, Items 78 and 79.

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but under the Jammu and Kashmir Constitution of 1957, the appointment of the judges of the Kashmir High Court is made by the President of India by warrant under his hand and seal, after consultation with the Chief Justice of India and the Sadar-i-Riyasat of Jammu and Kashmir.[59] Under the Constitution Act, 1996 (1939 A.D.)[60] (as amended by Act X of s.2000 and Act XV of s.2009) the appointment was made by the Sadar-i-Riyasat.[61]

(xi) Parliament cannot legislate with respect to elections to the legislature of the State.[62]

The State had its own election laws, and it was felt that the Union Election Laws were not suitable to the State. However, by Act XIX of 1959,[63] the jurisdiction of the Union Election Commission was extended to Kashmir, but appointment of the Election Commissioner for the State had to be made by the Sadar-i-Riyasat (now The Governor) to function under the laws of the State.[64]

(xii) Originally Parliament had no power with respect to audit of the accounts of the State.[65] But by C.O. 56,[66] Articles 149 and 150 which deal with the powers and duties of the Comptroller and Auditor General of India with regard to the Audit of accounts were extended to Kashmir.

(xiii) Powers of legislation not enumerated in the legislative lists[67] vest in the Kashmir legislature; they do not

59 *Constitution of Jammu and Kashmir*, Section 95.
60 Act XIV of 1996 (A.D. 1939).
61 *Ibid.*, Section 49.
62 *Constitution of India, Union List*, Item 72.
63 *Constitution of Jammu and Kashmir (First Amendment) Act, 1959*, Section 8.
64 See Chapter 7 post.
65 *Constitution of India*, Union List, Item 76.
66 *Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1958*.
67 *Constitution of India, Union List*, Item 97.

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so vest in the rest of India. Neither the State List nor the Concurrent List are applicable to Kashmir.[68] The extent of the legislative powers of the State of Jammu and Kashmir extend to all matters "except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."[69] These powers are contained in the Union List.

Concurrent Powers of Legislation

List III of the Seventh Schedule enumerates the matters which give concurrent powers of legislation to both the States and the Centre.[70] Professor Wheare observes[71] that the inclusion of concurrent jurisdiction in a constitution "adds yet another series of disputes about jurisdiction to the already formidable list of possible conflicts which are inevitable in even the simplest federal system" but in fact, Indian experience does not suggest that the provisions of its Constitution relating to distribution of powers has resulted in an alarming increase in litigation or a massacre of legislation. There are many good reasons for providing a concurrent jurisdiction. "Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively, either to a central or to a provincial legislature and for which, though it is often desirable that provincial legislation should make provision, it is equally necessary that the central legislature should also have a legislative jurisdiction, to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial effort, and in others again to provide for michiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single

68 *C.O. 48*, Section 2(22)(b).
69 *Constitution of Jammu and Kashmir*, Section 5.
70 *Constitution of India*, Article 246(2).
71 Wheare, K.C., *Federal Government*, 1953, p. 82.

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province".[72] The Concurrent List covers such matters as criminal law[73] and criminal procedure,[74] preventive detention for reasons connected with the security of a state or to the maintenance of supplies and essential services for the community,[75] transfer of property,[76] legal, medical and other professions.[77] Both Parliament and the State legislatures have the power to legislate on these matters. If a State law is repugnant to a Union law which Parliament is competent to enact or to any existing law on the matter in the concurrent list, the Indian law whether before or after to the State law shall prevail and the State law shall to the extent of such repugnancy be void.

However, the rule applies only when the two laws are laws on the same subject, being a matter coming within an item on the concurrent list.[78] Also, when a State law on a concurrent subject has been reserved for the consideration of the President and has received his assent, it prevails in that State, though Parliament may at any time further enact legislation with respect to the same matter including a law which may affect the State law.[79] Parliament thus becomes paramount and the President's assent to a State law gives protection to the State law so long as Parliament does not legislate again with respect to the same matter.[80]

The concurrent list is *not* applicable to Kashmir,[81] and the jurisdiction of the Union is confined to the matters enumerated in the Union List with the exceptions noted above. On all other matters, the State retains exclusive jurisdiction. But even

72 *Report of the Joint Select Committee on Indian Constitutional Reforms (1934)*, para. 51.
73 *Constitution of India*, Concurrent List, Item 1.
74 *Ibid.*, Item 2.
75 *Ibid* , Item 3.
76 *Ibid.*, Item 6.
77 *Ibid.*, Item 26.
78 *Zaverbhai* v. *State of Bombay* [A.I.R. (1954), S.C. 752].
79 *Constitution of India*, Article 254 (2).
80 *Zaverbhai* v. *State of Bombay* [A.I.R. (1954) S.C. 752].
81 *C.O. 48*, Section 2 (22) (b).

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then any law of the State legislature which is repugnant to a law of Parliament, whether passed before or after the State law, shall, to the extent of such repugnancy be void.[82] Of course, there being no concurrent sphere, there will arise no question of repugnancy relating to any subject which is enumerated in the concurrent list of the Constitution of India. In the rest of India the scope of Article 254 is restricted by the pronouncement in *Zaverbhai's case*.[83] A state law on an exclusive State subject prevails over a Central law and a Central law on an exclusive Union subject prevails over the State law. In the case of Kashmir, it would seem that in any case of repugnancy the central law prevails.[84]

Residuary Powers of Legislation

In the United States of America the residuary powers of legislation are vested in the component states,[85] while in Canada they belong to the Centre.[86]

Under the Government of India Act, 1935, the residuary powers of legislation were vested neither in the Centre nor in the provinces, but vested in the Governor-General who could by notification empower either to legislate on a matter within the residual field.[87]

Under the Constitution of India (1950), the residuary powers belong to the centre.[88] Parliament has exclusive power to make laws with respect to any matter not enumerated in the Concurrent List or the State List, including the power of making any law imposing a tax not mentioned in either of those lists. This power of the Union to legislate with respect to any

82 *Constitution of India*, Article 254.
83 *Zaverbhai* v. *State of Bombay* [A.I.R. (1954) S.C. 752].
84 So far no such case has been reported in which this question arose.
85 *10th Amendment*.
86 *British North American Act*, Section 51.
87 *Government of India Act, 1935*, Section 104.
88 *Constitution of India* (1950), Article 248.

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matter *not* enumerated in the State List is supported by Item 97 of the Union List, which reads:

> "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

This provision justifies the observation of Sir Ivor Jennings[89] that in India there is a strong centralising tendency.

In the case of Jammu and Kashmir, however, the residuary power of legislation belongs not to Parliament but to State legislature, which would legislate on any matter not enumerated in the Union List. Item 97 of List I, set out above, is not applicable to Kashmir.[90] Parliament cannot by virtue of a resolution of the Council of States under Art. 249, that the national interest demands it, enact temporary legislation on a State subject.[91]

Power to Implement Treaties and International Agreements

In the eyes of International law, India is one State, although it is internally composed of many States. International relations and rights or obligations arising from such relations effect India as a whole.

Entry 14 of the Union List, which reads:

> "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries",

makes the treaty making and the implementing of treaties a Union subject. But the power to make treaties etc., would become meaningless if the central government was not competent to legislate with respect to State subjects so far as neces-

89 Jennings, Sir Ivor, *Some Characteristics of the Indian Constitution*, p. 1.
90 *C.O. 48*, Section 2 (22) (a) (ii).
91 *Ibid.*, 2 (6) (b).

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sary for the purpose of giving effect to the treaty. Article 253 provides:

> "Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with another country or countries or any decision made at any international conference, association or other body."

This provision has been made with a view to avoid doubts as to where the power to implement treaty resides. But the power of Parliament to give effect to an international agreement etc., "would not extend to the abrogation of any of the Fundamental Rights or any other power or rights created by the Constitution".[92]

The power under Article 253 should logically extend to the cases of the cession of national territory as a result of an international agreement, but according to their Lordships of the Supreme Court of India,[93] this Article does not cover the case of the cession of National territory.

The *Berubari Union Case*, decided in the exercise of the Advisory Jurisdiction of the Supreme Court, dealt with the powers of Parliament to implement an agreement arrived at between the Government of India and the Government of Pakistan with regard to the cession of a part of the territory of India in settlement of Indo-Pakistan Border Disputes. Their Lordships of the Supreme Court of India, advised the President of India that "as law of Parliament relatable to Article 3 of the Constitution (which deals with alterations in internal boundaries) would be incompetent and that a law of Parliament relatable to Article 368 of the Constitution is competent and necessary". Their Lordships did not consider the application of Article 253 to the case at all, in view of their observations that the case dealt with cession of national territory, for which, in their Lordships opinion,

92 Gledhill, Alan, *Constitution of India*, p. 82.
93 *In re. Berubari Union* (1960), 3 S.C.R. p. 250.

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the constitution had to be amended, since it did not expressly provide for cession of national territory.

With great respect to their Lordships of the Supreme Court, it is submitted that cession of national territory is an essential attribute of sovereignty and no express provision is necessary in the Constitution providing specifically for it. It is submitted that Article 253 of the Constitution was relevant; cession of national territory is the substance of most treaties. The power in Article 3 was invoked when it was necessary to cede a strip of territory in Assam to Bhutan in 1951.[94] The Indian Constitution itself seems to assume that the Treaty-Making power dealt with in Article 253 is in relation to Jammu and Kashmir restricted by the following proviso:

> "Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of Government of that State."[95]

It is true that Article 368 dealing with amendments to the constitution has the following proviso:

> "Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of Article 370",

but this is susceptible of a clear interpretation without assuming any reference to legislation to give effect to a treaty.

What is clear is that no part of the State of Jammu and Kashmir can be disposed of as a result of international agreement without the consent of the State Government (*not the State legislature*), and if any decision regarding such disposition is taken in contravention of the provisions, it will not be binding on the State. It must also be pointed out that the consent will

94 Act XLVII of 1951.
95 *C.O.* 48, Section 2(6)(e).

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have to be taken prior to the agreement and the subsequent consent may not validate the agreement. The words '*without the consent*' refer to the prior consent. Apart from the disposition of the State of Jammu and Kashmir, Parliament's power to alter name, area or boundary of the State is restricted by the proviso to Article 3:

> "Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of Legislature of that State."

The provisions referred to immediately above impose an important limitation on the powers of the Union as a sovereign state and may put the Union in an awkward situation in its relations with foreign countries.[96] But the extent of the difficulties, which will arise in practice will depend on the relations between the State and the Union. There is no general rule of international law that the consent of the population directly interested is essential to the validity of the cession of territory, but, in the case of Jammu and Kashmir, the Constitution provides these extraordinary safeguards. There is no conflict between them and the democratic principles, for a sovereign State defeated in war, may have no alternative to cession of part of its territory against the wishes of the inhabitants. It is the opinion of the present writer that, in order to enable the Union to discharge its duties with regard to Foreign Affairs and Defence, Article 253

96 By Article VI of the Constitution of United States of America, "...all treaties made, or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding". By virtue of this Article, the Migratory Bird Treaty Act passed by the Congress to implement a treaty between United States of America and Great Britain was held valid notwithstanding the fact that the States had a constitutional title to the migratory birds within them. (See, *Missouri* v. *Holland*) (1920) 252. U.S. 416.

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should be applied to the State of Jammu and Kashmir also. The State in practice can only rely on the Union Government to do its utmost to preserve the integrity of the State and give effect to the wishes of the inhabitants of the State.

(iii) The Scheme of Distribution of Executive Powers

In a federal constitution, the respective spheres of the Union and the States are strictly limited and the jurisdiction of one excludes the jurisdiction of the other. The Union power covers matters on the Union Legislative List, the State power matters on the State List and also matters on the Concurrent List, save that Parliament may, by any law on a concurrent matter provide for its administration by a Union Instrumentality.[97] There are also provisions for the delegation of Union powers to the States and *vice versa*.[98] But the success and strength of such a scheme requires co-operation and co-ordination between the two sets of Governments.

In India the central government or the Union is responsible for the governance of the country, and so it becomes important that there should be an effective administrative nexus between the Union and the States. We have seen in the last section that the position of the Parliament in India is 'paramount'. The Executive power of the Union has been defined by the Supreme Court thus:

> "The executive power of the Union is co-extensive with the power of Parliament with this limitation that the executive cannot act against the provisions of the Constitution or of any law made by the Parliament."[99]

The Union has, of course, its own area of power, but the territories in which it functions are under the control of States, which in turn have their own areas of power independently of the Union. To ensure that a State Government by its acts does not

97 *Constitution of India*, Articles 73 and 162.
98 *Ibid.*, Articles 258 and 258A.
99 *Ram Jawaya* v. *State of Punjab* (1953) 2 S.C.R. 225 (234-37).

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undermine the unity of the nation, certain powers of administrative control over the states have been given to the central government and a duty has been imposed on the States to so exercise their executive powers as to secure that due effect is given to every Act of Parliament, which applies to the State, within the territories of that State and to effect its compliance the Union Government has been empowered to issue directions to the State Governments.[100] The directions may be given to the States in the following matters:

(i) To ensure due compliance with Union laws and existing laws.[101]
(ii) To ensure that the exercise of the executive power of the State does not interfere with the exercise of the executive power of the Union.[102]
(iii) To ensure the protection of railways within the State.[103]
(iv) To secure construction and maintenance of means of communication of military importance by the State.[104]

The sanction behind these directions is Article 365, which empowers the President to issue a Proclamation to the effect that the government of the State which does not comply with the directions cannot be carried on in accordance with the provisions of this constitution and so:

(a) assume to himself all or any of the functions of the government of the State and all or any of the powers vested in or exercisable by any body or authority in the State other than the Legislature of the State; and
(b) declare that the powers of the Legislature of the State

100 *Constitution of India*, Article 256.
101 *Ibid.*, Article 256.
102 *Ibid.*, Article 257(1).
103 *Ibid.*, Article 257(3).
104 *Ibid.*, Article 257(2).

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shall be exercisable by or under the authority of the Union Parliament.

However, these extraordinary powers of the Union are subject to two limitations. Firstly, every Proclamation, which has to be laid before Parliament, ceases to have effect at the expiration of two months unless approved by each House of Parliament before the expiration of the period. A Proclamation approved by both Houses of Parliament ceases to be in force on the expiration of a period of six months. The Proclamation can be kept alive by subsequent resolutions of Parliament for six months at a time upto a total period of three years. Secondly, the President cannot assume to himself the functions of the High Court of the State by virtue *only* of this Article.[105]

The governance of the administrative relations between Kashmir and India is patterned on identical lines. But apart from the obligations provided under Article 256 and Article 257, the State of Jammu and Kashmir has the following further obligations in relation to the Union, by virtue of the addition of a proviso to Article 256:[106]

> "The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State, and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India."[107]

So far, we have seen that limitations were put *only* on the Union in regard to Kashmir, but the proviso by the words the State shall "*facilitate to discharge*" by the Union of its duties and responsibilities under the Constitution implies something

105 *Constitution of India*, Article 256.
106 *C.O. 48*, Section 2(6)(h).
107 *Ibid.*

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positive viz., active co-operation of the State Government with the Union Government.

The Jammu and Kashmir Government has an express duty to acquire or requisition property for Union purposes, if so desired by the Union. So far as the other Indian States are concerned, it is not necessary to impose a duty to requisition property for Union purposes, because Parliament can provide for it by a law made under List III (Concurrent List) Item 42, but it cannot do so in Kashmir because List III is not applicable to Kashmir.

Previously, the legislative power with respect to acquisition and requisition was divided between the Union and the State legislatures, but by a constitutional amendment in 1956, the whole subject of acquisition and requisition has been transferred to the concurrent list; a contention such as was raised in *State of Bombay* v. *Gulshan*,[108] viz., that it was not within the competence of the State to requisition property for 'Union purposes' cannot be raised now as either of the two (Union and the States) can requisition property for any purpose. It does not matter in which government the acquired property is to vest for the purposes of exercising the legislative powers.[109] Moreover, a law relating to acquisition will come under Item 42 of List III even if the acquisition relates to military purposes.[110]

However, although the Union can give directions to the Kashmir Government, it has not the power to enforce compliance by exercise of the powers in Article 365 which does not apply in Kashmir. If the State Government declines to carry out the directions received, no direct sanction is available to the Union Government.[111] Of course, the Union might exercise pressure indirectly for instance by cutting the grant-in-aid made to the State[112] but for the most part the Union will have to depend on the goodwill of the Kashmir Government.

Under Article 261 of the Constitution full faith and credit must be given to the public acts, records and judicial proceedings of the Union and of every State, throughout the territory of

108 *Bombay* v. *Gulshan* (1956) S.C.A. 17(21).
109 *Raghubir* v. *State of Ajmer* [A.I.R. (1959) S.C. 475 (479)].
110 *Sonavati* v. *State of Bihar* [A.I.R. (1957) Patna 270 (274)].
111 *C.O. 48*, Section 2(14)(b).
112 *Constitution of India*, Article 275.

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India. This article is intended to secure the effective administration of justice throughout India. The application of the provision of "full faith and credit" does not depend upon the consent of the State where it is sought to be applied.[113]

Article 261 has three clauses. While Clause (1) lays down that the public acts etc., shall receive the same credit in another State as at home, Clause (2) gives Parliament power to lay down by law:

(a) the mode of proof;
(b) the effect of such acts and proceedings in other States.

Clause (3) provides that any executable civil judgment or order of any State shall be directly executable in another State. But it does not follow that decree passed in one part can be implemented in another part without legislation providing for it.[114] It must be noted also that the clause refers only to civil judgments and as such the penal laws of one State are not enforceable in another.

Article 261 applies to Kashmir but it is the State legislature, not the Union Parliament, which has the power to lay down the manner in which and the conditions under which the acts, records and proceedings of the Union or of any other State shall be proved in Jammu and Kashmir and the effect thereof.[115]

As the American-Canadian Inter-State Commission has shown, disputes between different states relating to water-courses or rivers are rarely susceptible of satisfactory enquiry in a Court of law. In India where rivers run through more than one State, inter-provincial disputes are inevitable. Provision has been made to deal with such disputes, and Parliament is empowered to lay down by law for the adjudication of such disputes or complaints. Further, the Constitution lays down that Parliament may by law provide that neither the Supreme Court nor the High Court of any State shall exercise

113 *Morris* v. *Jones* (1947) 329 U.S. 545.
114 *Augusthi* v. *Subramonia* [A.I.R. (1958) Kerala 15].
115 *C.O. 48*, Section 2(6)(i).

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jurisdiction in respect of any such dispute or complaint.[116] These provisions apply to Kashmir also.

If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of:

(a) inquiring into and advising upon disputes which may have arisen between States;
(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States have a common interest; or
(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it is lawful for the President by order to establish such a Council, and to define the nature of its duties and its organisation and procedure.[117]

Such a provision is necessary to iron out differences, to remove misunderstandings and to secure harmony between the Union Government and the States, and between the States *intere se* whenever the occasion arises.

This provision is applicable to Kashmir also. The State of Jammu and Kashmir is a member of the *North Zone Council.*

(3) JUDICIAL POWERS UNDER THE CONSTITUTION OF INDIA

We have seen in chapter 5 that the political organisation of the Indian Republic is federal in character. But unlike the Australian Federation,[118] the judicial organisation is purely

116 *Constitution of India*, Article 262.
117 *Constitution of India*, Article 263.
118 Section 71 of the *Australian Constitution Act* provides that the judicial authority of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia and such other Federal Courts as the Parliament may create and in such other courts as it may invest with federal powers. The two judicial systems are distinct and separate. It follows as a logical consequence that the High

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unitary, with the Supreme Court as the final judicial authority. The Constitution of India neither recognises the dualty of judicial machinery, nor does it prescribe any scheme for distribution of judicial powers between the Union and the States.

The position which the Supreme Court of India occupies under the Constitution clearly reflects the unitary character of the Indian Judicial System. Article 141 declares that the law laid down by the Supreme Court shall be binding on all Courts within the territory of India and Article 144 prescribes that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. The Constitution expressly confers on the Supreme Court[119] the jurisdiction and powers exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law.

Composition of the Supreme Court

The Supreme Court of India consists of a Chief Justice and thirteen[120] other judges and Parliament has the power to add to the number.[121] The appointment of the Chief Justice as well as the other judges vests in the President, but he is obliged to consult the Chief Justice of India for the appointment of the other judges.[122]

To be qualified for appointment as a judge of the Supreme Court, a person must have been a judge of one or more High Courts for five successive years, or an advocate of one or more High Courts for ten years, or be an eminent jurist.[123]

Judges hold office until they attain the age of 65 years,[124] but they may be requested to sit in Supreme Court after their retire-

Court of Australia has no jurisdiction over the courts of the States except in cases where the State Courts are exercising federal jurisdiction or where an appeal lay to the Queen in Council from such State Courts at the establishment of the Commonwealth.

119 *Constitution of India*, Article 135.

120 Originally 7 but increased to 13 by Act 17 of 1960 and to 17 by Act, No. 48 of 1977.

121 *Constitution of India*, Article 124(1).

122 *Ibid.*, Article 124(2).

123 *Ibid.*, Article 124(3).

124 *Ibid.*, Article 124(2).

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ment.[125] A judge of the Supreme Court can resign by writing under his hand addressed to the President[126] and he can be removed for misbehaviour or incapacity on an address passed in the same session by both Houses of Parliament with a majority of the *total* membership of, and a two-thirds majority of those voting in each House.[127]

The normal place of the sitting of the Supreme Court is Delhi, but the Chief Justice may, with the approval of the President of India, order the court to sit elsewhere.

Original Jurisdiction of the Supreme Court

Article 131 of the Constitution of India confers original jurisdiction on the Supreme Court in respect of any dispute:

(i) between the Union Government and one or more states;
(ii) between the Union Government and one state or states on one side and one or more other states on the other; and
(iii) between two or more states,

and thus, the original jurisdiction of the Supreme Court covers all disputes in respect of justiciable issues between any two governments established under the Constitution.[128] But there are two express limitations on this jurisdiction. In the first place, the Supreme Court has no jurisdiction in respect of a dispute arising under a treaty, agreement, covenant, engagement, sanad or other similar instrument concluded before the commencement of the Constitution but continued in operation after such commencement. Secondly, the jurisdiction of the Supreme Court does not extend to a dispute arising out of any instrument of the kind mentioned above which exclude the jurisdiction of the Supreme Court to such disputes. "The

125 *Constitution of India*, Article 128.
126 *Ibid.*, Article 124(2).
127 *Ibid.*, Article 124 (4).
128 Parties to the dispute must be the Constituent units of the Federation. See *State of Bihar* v. *Union of India*, A.I.R. 1970 S.C. 1446.

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justification for the exclusion", observes Sen,[129] "is no doubt based on the fact that many of them (instruments) are of a political character". The Government of India Act, 1935 contained a similar provision.[130] And whereas Article 131 excludes the jurisdiction of the Supreme Court in these cases, Article 363 bars interference by any court in respect of a dispute arising under a treaty, agreement, covenant, engagement, sanad or other similar instruments concluded between a ruler of any former Indian State and the Government of India before the commencement of the Constitution but which continued in operation after the Constitution came into force.

A dispute between an individual and the Union or an individual and a State does not come within the original jurisdiction of the Supreme Court under Article 131.

Appellate Jurisdiction of the Supreme Court

Civil Cases

Under Article 133 of the Constitution of India, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India. Prior to the Constitution (30th Amendment) Act, 1972, there used to be three alternative grounds for an appeal to the Supreme Court. These were: (i) value of appeal being Rs. 20,000/- and above; (ii) the matter in appeal indirectly involving the same value; and (iii) the case being otherwise fit for appeal to the Supreme Court. The test of value was omitted by the aforesaid Amending Act of 1972.[131] The three grounds have been substituted by practically one ground viz. that the case involves a substantial question of law which, in the opinion of the High Court needs to be decided by the Supreme Court.[132] No certificate would be granted under Article 133 (after 1972) unless the question of law is not only a substantial question,

129 Sen, D.K., *A Comparative Study of the Indian Constitution*, p. 273.
130 *Government of India Act, 1935* Section 204(1). (26 Geo. 5 Ch. 2).
131 It came into force on 27-2-1973.
132 *State Bank* v. *Money*, A.I.R. 1976 S.C. 1111.

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but also of general importance.[133] Thus, a question of 'private importance' even if very substantial so far as the litigating parties are concerned is not sufficient for a certificate under the amended article. It has been held by the Supreme Court that the word "needs" suggests that there must be some imperative necessity. [134] Thus, where a different view has been taken by another High Court or there is conflict of judicial opinion on a particular point by different High Courts, such a question would *need* to be decided by the Supreme Court.[135] Again, where decided cases do not provide a guide, such a question would need to be decided by the Supreme Court.[136]

The fitness of a case for appeal to the highest Court was defined by the Judicial Committee of the Privy Council in *Banarsi Prasad's case*[137] as "it is clearly intended to meet special cases, such as, for example, those in which the point in dispute is not measurable by money, though it may be of a great public or private importance". The grant of the Certificate is, of course, the exercise of the discretionary powers of the High Court, which must be properly and judicially exercised.

The Supreme Court has ruled that it will not go behind the findings of fact by the final court, but where the judgment, decree or final order of the High Court is based partly on a misreading of evidence and partly on non-advertence to important material evidence, it would interfere with the findings by examining the evidence.[138] As a logical corollary, it seems that where there are no concurrent findings of fact, the Supreme Court will allow new evidence to be placed before it in support of the appellant's contention.[139]

133 *State Bank* v. *Money*, A.I.R. 1976, S.C. 1111.
134 *Ibid.*
135 *Union of India* v. *Hafiz Mohd., A.I.R.* 1975 Delhi 77 (F.B.).
136 *N.D M C.* v. *State of Andhra Pradesh*, A.I.R. 1976 Delhi 1.
137 *Banarsi Prasad* v. *Kashi Krishna* [(1901) 28. I.A. 11].
138 *Moran Mar Basselios Catholicos* v. *Paulo Avira* [A.I.R. (1959) S.C. 31].
139 *Asiatic Steam Navigation Co.* v. *Arbinda Chakravarti* [A.I.R. (1959) S.C. 597].

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Criminal Cases

The Supreme Court of India has appellate jurisdiction in criminal cases also and that jurisdiction may be invoked in the following classes of cases:

(1) Where the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death. But where the High Court has on appeal reversed an order of conviction of an accused person and ordered his acquittal, these provisions cannot be invoked.[140]
(2) Where the High Court has withdrawn for trial before itself a case from a subordinate court and has in such trial convicted the accused person and sentenced him to death.
(3) Where the High Court has certified that the case is fit for appeal to the Supreme Court.[141]

The grant of this certificate also is at the discretion of the High Court, but the discretion must be exercised judicially, and may be exercised when a substantial question of law is involved[142] or where there has been a substantial miscarriage of justice.[143] But when there have been concurrent findings of fact by the courts below, the Supreme Court will not go beyond those concurrent findings.[144] The jurisdiction of the Supreme Court can, however, be extended by an act of Parliament. The Supreme Court has held that in view of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970, no certificate of High Court is required for an appeal where an acquittal has been converted into a conviction under section 302/34 I.P.C., and a sentence of life imprisonment imposed upon

140 *State Government of Madhya Pradesh* v. *Ramkrishna* [A.I.R. (1954) S.C. 20].
141 *Constitution of India*, Article 134.
142 *S.K. Gupta* v. *B.K. Sen* [A.I.R. (1959) Cal. 106].
143 *Jamuna Prasad* v. *Lachi Ram* [A.I.R. (1954) S C. 686].
144 *Thakur Prasad* v. *State of Madhya Pradesh* [A.I.R. (1954) S.C. 30)]; *Bankey Lal* v. *State of U.P.* [A.I.R. (1971) S.C. 2233].

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an accused. The appeal, in such a case lies as a matter of right to the Supreme Court.[145] A new Article 134-A has been inserted by the Constitution (44th Amendment) Act, 1978 in order to provide that the High Court should consider the question of granting of certificate immediately on the delivery of judgment, decree, final order or sentence conceived on the basis of oral application by a party, but this amendment has not been extended to the State of Jammu and Kashmir.

Appeals by Special Leave

In addition to the original and appellate jurisdiction of the Supreme Court, the Constitution provides that the Supreme Court is empowered to grant, in its discretion, special leave to appeal from and judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal other than a court martial.[146] The legislature cannot take away or cut down this jurisdiction.[147] As regards the exact scope of this jurisdiction, the Supreme Court has observed:

> "It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court by the Constitutional provisions made in Article 136. The limitation whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and exceptional situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule."[148]

Ordinarily, in an appeal by special leave under Article 136,

145 *Ram Kumar Pande* v. *State of M.P.* [A.I.R. (1975) S.C. 1026].
146 *Constitution of India*, Article 136.
147 *Raj Krishna Bose* v. *Vinod Kanungo* [A.I.R. (1954) S.C. 202].
148 *Dhakeswari Cotton Mills* v. *Commissioner of Income Tax* [A.I.R. (1955) S.C. 65].

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it is not permissible to make submissions on questions of fact,[149] but it is open to the appellant under Article 136 to raise questions of fact or to ask for interference with concurrent findings of fact if the findings have been vitiated by error of law or the conclusions of the court below are patently opposed to a well established principle and have caused miscarriage of justice.[150] Once the court finds that there has been a failure of justice, the court will interfere even if it involves an examination and appreciation of the facts of the case.[151] In fact the Supreme Court of India has extended its jurisdiction beyond what was contemplated by the framers of the Constitution. In criminal matters, it has gone beyond the self imposed limits defined in *Pritam Singh's case*,[152] which only contemplate appeals (a) if exceptional and special circumstances exist, (b) if substantial and grave injustice has been done and (c) if the case presented features of sufficient gravity to warrant review. It assumed jurisdiction over election tribunals, which would seem to be barred by Article 239 (b) of the Constitution of India in consequence of which Parliament deemed it necessary to regularise the situation by making statutory provisions for such interference. Since the abolition of Industrial Tribunal's Appellate Tribunal, it has taken over the jurisdiction of that body by grants of special leave to appeal under Article 136. With the great increase in constitutional litigation and the amplification of its powers to grant special leave, the Supreme Court's powers to deal with civil appeals, admitted as of right are at present pushed into the background.

Advisory Jurisdiction of the Supreme Court

Article 143 of the Constitution of India provides that the President may refer any question of law or fact, which has arisen, or is likely to arise, to the Supreme Court for its consideration

149 *Ram Prakash* v. *State of Punjab* [A.I.R. (1959) S.C. 1]. See also A.I.R. 1971, S.C. 1977 and A.I.R. 1971 S.C. 2233.

150 *Ratan Chand* v. *State of Bihar* [A.I.R. (1959) S.C. 18]. See also A.I.R. 1971, S.C. 2156.

151 *Pritam Singh* v. *State* [A.I.R. (1950) S.C. 169].

152 *Ibid.*

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and opinion thereon.[153] Clause (2) of the Article further authorises the President to refer to the Supreme Court for opinion any dispute arising out of any provision of a treaty, covenant, sanad or other similar instrument which was concluded between an Indian State and the Government of India before this Constitution came into force. This jurisdiction is of an exceptional nature. It is not of the character of a judgment and is not therefore binding upon the courts in India, but such opinions will carry great weight and authority with all courts and tribunals in India. However, the Supreme Court is "not obliged to give its opinion"[154] on a case referred to it by the President. Though, so far the court has not refused to exercise the advisory jurisdiction.

Writ Jurisdiction

Article 32 of the Constitution of India empowers the Supreme Court to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for the purpose of enforcement of the Fundamental Rights and Article 139 empowers Parliament to by law confer on the Supreme Court powers to issue writs in the nature of those mentioned in Article 32 for *any purpose* in addition to the enforcement of the fundamental rights. This right to move the Supreme Court for the issue of a writ is, it might be observed, itself a fundamental right. We shall discuss the writ jurisdiction in Chapter 8.[155]

The Supreme Court of India occupies the same position and status in Jammu and Kashmir State as in the rest of India, and is the final court of appeal for this State also.[156] The Civil and judicial authorities of the State act in aid of the Supreme Court.[157]

The *Original and appellate* jurisdiction of the Supreme Court extends to the State of Jammu and Kashmir with a slight diffe-

153 For instance, the President sought the opinion on the *Kerala Education Bill*, the *Berubari Union* and *The Special Courts Act*, 1978.
154 Gledhill, Alan, *Constitution of India*, p. 140.
155 See pp. 287-335 below.
156 *Constitution of India*, Article 132.
157 *Ibid.*, Article 144.

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rence in so far as the appellate jurisdiction of the Supreme Court in criminal matters is concerned. Whereas, in the rest of India, the Union Parliament may by law confer on the Supreme Court more powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding from the High Courts at its discretion,[158] in the case of Jammu and Kashmir, the Union Parliament can only confer such additional powers "on the request of the legislature of the State".[159] Thus, any additional powers which are conferred on the Supreme Court of India would extend to the State of Jammu and Kashmir *only* if there had been a request from the State Legislature to that effect. It will be observed that the clause provides for a "request" from the State legislature before Parliament extends the powers of the Supreme Court in relation to the State and it would seem that if Parliament enabled such legislation without such request, it could not be validated by subsequent ratification by the State legislature.

The right of appeal by special leave under Article 136 has been extended to the State of Jammu and Kashmir with effect from 26th January, 1960.[160]

The advisory jurisdiction of the Supreme Court under Article 143 extends to the State from the commencement of the *Constitution (Application to Jammu and Kashmir) Order, 1954.*

At the time when the negotiations for the application of the Constitution of India to Kashmir were going on, the decision regarding the application of the fundamental rights to the citizens (Permanent residents) of Kashmir was kept in abeyance.[161] But in 1954, the State Government agreed to adopt, with some variations, the fundamental rights as incorporated in the Constitution of India. This incorporation of the fundamental rights would have become meaningless if there was no way of redressing their infringement. Accordingly, Article 32 which confers upon the Supreme Court the requisite powers for the enforce-

158 *Constitution of India*, Article 134(1).
159 *C.O. 48*, Section 2(5)(d).
160 *Constitution (Application to Jammu and Kashmir) Amendment Order, 1960, C.O. 60.*
161 See Chapter 5, 'Delhi Agreement'.

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ment of the fundamental rights by issuing writs, orders or directions, was extended to Kashmir. To ensure the enforcement of the fundamental rights within the territorial jurisdiction of the State, the Kashmir High Court was granted power to issue writs, orders or directions.[162]

The sole purpose of extending the writ jurisdiction of the Supreme Court to Kashmir was to secure the enforcement of the fundamental rights only, so Article 139 of the Constitution of India, which deals with the powers of Parliament to confer authority on the Supreme Court to issue orders, directions or writs of the nature mentioned in Article 32, for *any other purpose* and cases in which no fundamental rights were involved, was not made applicable to Kashmir. In the words of the Kashmir Premier "in arriving at this arrangement, the main consideration before our government was to secure a position for State which would be consistent with the requests of maximum autonomy for the local organs of the State power which are the ultimate source of authority in the State while discharging obligations as a unit of the Federation".[163]

Before 1954, the High Court in Kashmir had no writ jurisdiction at all and after 1954 [i.e. after the Constitution (Application to Jammu and Kashmir) Order, 1954] and before 1957 (before the Constitution of Jammu and Kashmir 1957 came into force) the High Court of Jammu and Kashmir did not possess any power to issue writs for *any purpose* other than those of the enforcement of the fundamental rights. After the Constitution of Jammu and Kashmir, 1957 came into force, the High Court in Jammu and Kashmir got the powers to issue writs, orders and directions for "any purpose other than those mentioned in clause (2A) of article 32 of the Constitution of India".[164] With this provision, the position has been assimilated

162 *Constitution of India*, Article 32(2A).

163 Sheikh Mohammed Abdullah on Delhi Agreement in the Jammu and Kashmir Constituent Assembly on August 11, 1952. (As reproduced in Government of Jammu and Kashmir, *India and Kashmir—Constitutional aspect*, pp. 13-23).

164 *Constitution of Jammu and Kashmir*, Section 103.

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to that in the other States of India.[165]

(4) EMERGENCY POWERS UNDER THE CONSTITUTION OF INDIA

The Constitution of India contemplates three types of emergencies:

(i) Emergency arising out of war or internal disturbance [166]
(ii) Breakdown of constitutional machinery in the States.[167]
(iii) Financial emergency.[168]

(i) Emergency arising out of War or Internal Disturbance

Article 352 of the Constitution declares that, if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory of India is threatened whether by war, external aggression or internal disturbance, he may, by a proclamation make a declaration to that effect. He may make such a proclamation not only when an occurrence which endangers the security of India has taken place, but also if there is imminent danger thereof. Accordingly, clause (3) of Article 352 provides:

> "(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof."

This clause makes the President of India the sole judge of

165 The organisation, composition and jurisdiction of the High Court of Jammu amd Kashmir is dealt within Chapter 8 below.
166 *Constitution of India,* Article 352.
167 *Ibid.*, Article 356.
168 *Ibid.*, Article 360.

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whether the emergency exists or not. His decision that the security of India is threatened or there is imminent danger thereof by war, external aggression or internal disturbance may not be challenged in a court of law and is thus final.

In *Bhagat Singh's case*,[169] where an ordinance made by the Governor-General under section 72 of the Government of India Act, 1919,[170] was challenged on the grounds that there existed no emergency to justify the taking of the action by the Governor-General, the Privy Council observed:

> "The petitioner asked the Board to find that the emergency did not exist. This raises directly the question who is to be the judge of whether a State of Emergency exists. A State of Emergency is something that does not permit of any exact definition. It connotes a State of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone."

The view expressed by the Privy Council in *Bhagat Singh's case* was subsequently followed by the Federal Court in *Basant Chandra's case*.[171] The present writer is of the view that the same opinion would hold good in the case of the exercise of powers under Article 352 by the President of India.

Effects of a Proclamation of Emergency

Articles 353 and 354 of the Constitution of India deal with the effects of the Proclamation of Emergency. These effects can be classified under four heads:

(a) *Executive.* When a Proclamation of Emergency is in operation, the State Government would come under the complete control of the Union Government, which would have the authority to give directions to the State

169 *Bhagat Singh* v. *Emperor* [A.I.R. (1931) P.C. 111].
170 9 and 10 Geo. V Ch. 101.
171 *Basant Chandra* v. *Emperor* [A.I.R. (1944) F.C. 86].

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Governments on *any* matter.[172] India, in such circumstances, would function as a unitary State rather than a Federal State.

(b) *Legislative:* As soon as a State of Emergency has been declared and a Proclamation issued, the Union Parliament shall have the power to legislate as regards any matter to which the jurisdiction of the State extends. Although the State legislature shall not be suspended, the power of the Union Parliament shall be extended to legislate on *any* subject as may be necessary and Parliament shall have the power to make laws conferring upon the Union executive powers for carrying out the laws made by Parliament.[173]

(c) *Financial:* As the Proclamation of Emergency is likely to affect the financial position of the Union, provision has been made for modifying the provisions relating to distribution of revenues between the Union and the States while a Proclamation of Emergency is in operation, to secure adequate revenues for the Union to meet the new situation. The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions relating to the distribution of the net proceeds of taxes levied by Parliament but distributed between the Union and the States shall for such period, not extending beyond the financial year in which the proclamation ceases to operate, as may be specified in the Order, have effect subject to such exceptions and modifications as he thinks fit. Every such order, however, shall be laid before Parliament, as soon as may be, after it is made.[174]

(d) *Fundamental Rights*: An emergency necessitates the taking of all steps which are necessary for the safety of the State. Such measures are likely to effect the Fundamental Rights guaranteed to the Citizens of India by the Constitution. Article 358 of the Constitution

172 *Constitution of India*, Article 353(a).
173 *Ibid.*, Article 353(b).
174 *Constitution of India*, Article 354.

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> provides that while a Proclamation of Emergency is in operation, the protection of rights guaranteed under Article 19, i.e. freedom of speech, association, assembly; the right to move and settle anywhere in India; the right to follow an avocation and the right to property, would not restrict the powers of the State (i.e. Government and Parliament of India and the Government and legislature of each State and all local or other authorities within the territories of India) to make any law or to take any executive action which the State would, but for the provisions regarding fundamental rights, be competent to make or take. However, any law so made shall to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as regards things done or omitted to be done before the law so ceases to have effect.[175]

Article 359 empowers the President to suspend the right to move the court for the enforcement of any of the fundamental rights, as may be specified in the Order, during the operation of a Proclamation of Emergency or for such shorter period as may be specified in the order itself. Every such order must be, after it is made, laid before each House of Parliament.

The effects of a Proclamation of Emergency would be the same in Jammu and Kashmir State as in the rest of India, but the grounds for issuing a Proclamation are restricted. The President's power of issuing a Proclamation under Article 352 is limited by clause (4) of Article 352:

> "(4) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respect Article 354) unless it is made at the request or with the concurrence of the Government of that State."[176]

175 *Constitution of India*, Article 358.
176 *C.O. 48*, Section 2(13)(b).

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Thus, whereas it would be within the powers of the President of India to issue a proclamation on the grounds of war or external aggression or an imminent danger thereof, it would not be within his powers to issue a Proclamation for reasons *only* of internal disturbance in the State, unless a request comes from the State Government or the Proclamation is issued in concurrence with the State Government. In a State, part of whose territory is under enemy occupation, who has hostile intention towards the rest of the territory also, the necessity of vesting the power to declare an emergency caused by external aggression in the Union Government becomes obvious.

The Constitution (44th Amendment) Act, 1978 which has amended the provisions of Article 352 etc. has however, not been extended to the State of Jammu and Kashmir so far and the emergency provisions contained in the original Articles 352 to 360, as they existed before the (44th Amendment) Act, 1978 continue to be in force in so far as this State is concerned.

A conjoint reading of Articles 246, 250, 352 and 353 as applicable to the State leaves no room for doubt that though Parliament is not competent in normal times to make laws with respect to matters not enumerated in the Union List so far as it is applicable to the State of Jammu & Kashmir, it acquires that power with the declaration of emergency by the President and continues to retain that power during the operation of the Proclamation of emergency. Thus on a declaration of emergency even matters which are ordinarily reserved for the State Legislature become part and parcel of the Union List.

(ii) Emergency arising out of Breakdown of Constitutional Machinery in the State

In relation to States other than Jammu and Kashmir, the Constitution of India empowers the President to take action either *proprio motu* or on the report received from the Governor of a State, in the event that the Government cannot be carried on in that State in accordance with the provisions of the Constitution. Such action can also be taken if the State Government disobeys an executive direction from the Union. The action may consist of transferring the legislative powers of the State legislature to Parliament and the suspension of those provisions of the Constitution which apply to that State. Such a Proclamation requires Parliamentary approval and the approval will only give the Proclamation a validity for six months, unless a further resolution has been passed by Parliament within that period. The Proclamation may be kept in

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force by repeated resolutions for a maximum period of three years. When such a Proclamation is in operation, Parliament may vest the State legislative powers in the President with authority to delegate them.[177]

So far as the State of Jammu and Kashmir is concerned, although the Union Government is obliged to ensure that the Government of the State is carried on in accordance with the provisions of the Constitution of India,[178] yet it has no power to suspend the Constitution on the grounds of failure of Constitutional machinery in the State. The cumulative effect of these provisions seem to be that the Union is under a duty to ensure that the relations between the Indian Union and Kashmir as outlined by the *Constitution (Application to Jammu and Kashmir), Order, 1954,* remain intact; but has no obligation to see that the government of the State is carried on in accordance with the provisions of the Consitution of Jammu and Kashmir.

A perusal of the Section 92 of the State Constitution and Article 356 shows that both the provisions can co-exist and they have to be construed harmoniously. There are a number of circumstances under which Article 356 can operate and those circumstances are not provided for in Section 92 of the Constitution of Jammu and Kashmir. For example, Section 92 would have no application where the President is satisfied that the Government of the State cannot be carried on in accordance with the Constitution of India. Again, Article 356, inter alia, deals with the situation where there is a failure to carry on the affairs of the State according to the Provisions of the Constitution of India or the provisions of the Constitution of Jammu and Kashmir. In the latter context, Article 356 can even postulate a situation where the government of the State cannot be carried on even in accordance with the provisions of the Constitution after recourse has been had to the provisions of Section 92. Whereas the life of the Proclamation issued under Section 92 is limited to six months, that is not the case under Arcile 356. Since, the internal affairs of the State were left to be covered in the Constitution of Jammu and Kashmir, not only the initial enactment but the continued existence of Section 92 is an essential feature of the Constitution of Jammu and Kashmir. Article 356 in terms of its plain reading does not and cannot cover the entire field of emergent situation that may

177 *Constitution of India,* Article 356.

178 Article 355 omitted vide *C.O. 48,* Section 2(3).

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result from the breakdown of the constitutional machinery in the State of Jammu and Kashmir. There is perhaps a slight overlapping between the two provisions but that slight overlapping cannot effect the efficacy of the provisions Sec. 92. The Constitution of Jammu and Kashmir has an autonomous existence and separate jurisdiction having been enacted by a duly convened Constituent Assembly. The spheres of the operation of Article 356 and Section 92 are clearly defined and demarcated.''

''The entire theory underlying ''implied repeal'' is the legislative intent to supersede the earlier law. That position is possible only, if either the ''superior'' legislature has the Legislative competence to legislate in respect of matter already enacted by the 'subordinate' legislature or the same legislature by its subsequent legislation supersedes the earlier legislation. The Constituent Assembly of the State, as already noticed, was not a 'subordinate, of the Constituent Assembly of India. In the present context the theory of ''limited repeal'' can be pressed into aid if either the Parliament or the President has the legislative competence to obliterate or repeal any provisions of the Constitution of Jammu and Kashmir.

''Section 147 of the Constitution of Jammu and Kashmir deals with the manner and procedure relating to the amendment of the constitution of Jammu and Kashmir and provides that an amendment of the Constitution may be initiated ''only'' by the introduction of a bill for the purpose in the Legislative Assembly of the State and when the bill is passed in each House by a majority of not less than two-third of the total membership that House, it shall be presented to the Governor (Sadder-i-Riyasat) for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill. The section also contemplates that certain provisions of the Constitution are beyond even the amending powers of the State Legislature. Thus, since the Constitution itself provides the procedure for its amendment it can be amended by following that procedure only and in no other way. It is, therefore, manifest that the Constitution of Jammu and Kashmir cannot be amended except by following the procedure prescribed by Section 147 of the State Constitution and it is futile to contend that by the application of Article 356 of the Constitution of India, Sec. 92 of the State Constitution has been 'impliedly repealed' or-rendered ''inoperative'' Since, the text of provisions of Section 92 of the State Constitution and Art. 356 of the Constitution of India are explicit, effect must be given to them and it is not open to the courts of law to

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ignore either of them. When there are two provisions of equal authority, as in the present case (Section 92 and Article 356), neither being subject to the other, the doctrine of 'repugnancy' or the theory of 'implied repeal' would have no application whatsoever. It deserves to be noticed here that the provisions of Article 356 and Section 92 are not all incompatible with each other and obedience to one cannot result in the breach of the other and as such the two provisions are not 'repugnant or inconsistent' with each other. It is the settle law that even in respect of ordinary legislation, so far as the State of Jammu and Kashmir is concerned let alone constitutional provisions, the Parliament cannot enact a law with respect to a field exclusively reserved for the State and if it does so enact the same cannot operate in derogation of the State law enacted by the legislature of the State in exercise of its legislative competence and the rule of repugnancy contained in Article 254 would have no application. Since, the Parliament cannot enact or repeal any provisions of the Constitution of Jammu and Kashmir directly; it cannot even achieve that objective indirectly or by implication.''

''Article 254 of the Constitution of India has no application to the two constitutional provisions, contained in two separate Constitutions. That apart, a close scrutiny of Article 254 shows that the article appears to have been applied to the State of Jammu and Kashmir only as an anticipatory provision. Article 370 had left it open to the State of Jammu and Kashmir to agree to the extention of the powers of the Parliament to make laws in matters other than those specified in the Instrument of Accession in the Union List or in the Concurrent List. By virtue of the various Constitution (Application to Jammu and Kashmir) Orders, certain entries from the list were extended to the State from time to time. Article 146(2) of the Constitution of India giving Parliament as well as state legislature the power to make laws with respect to any of the matters enumerated in the Concurrent List does not apply to the State of Jammu and Kashmir and, therefore, it can be said that the provisions of Article 254 are even otherwise 'really'' not applicable to the State. Article 254(1) assumes that if there is some repugnancy between any provisions of a law made by the legislature of a State and any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then subject to the provisions of cl. (2), the law made by the legislature of the State to the extent of the repugnancy, is to be declared void. Cl. (2) of Article 254 is an integral and important part of the

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article and it specifically postulates that in enacting a law on the relevant matter, the State may reserve it for consideration of the President and his assent and thereby save the consequences of cl. (1). The essential condition for the application of Art. 254(1) is that the existing law must be with respect to one of the matters enumerated in the Concurrent List, implying thereby that unless it is shown that the repugnancy is between the provisions of a subsequent law and those of an existing law in respect of the specified matters, the article would be in applicable.

The provisions of Article 254 in terms nor the doctrine of repugnancy based on the principles underlying Article 254, has any application to test constitutionality of Section 92 of the State Constitution. The doctrine of repugnancy has no application, whatsoever, while interpreting the provisions of two separate constitutions, each enacted by a distinct sovereign Constituent Assembly. There is always a presumption in favour of the validity of a constitutional provisions and every effort has to be made to so construe the provisions so as to avoid it being declared unconstitutional. Therefore, the provisions of Section 92 which is an intergral part of the Constitution of Jammu and Kashmir and which operates in its defined area is not repugnant to Article 356 and as a matter of fact both the provisions can co-exist and are capable of being construed harmoniously as already indicated.''[179]

At the time of the issuing of *Constitution (Application to Jammu and Kashmir) Order, 1954*,[180] there was in force in the Jammu and Kashmir State, the Constitution Act of 1939,[181] which dealt with the powers of the Head of the State in cases of breakdown of constitutional machinery in the State. After this Act was repealed by the Constitution of Jammu and Kashmir (1957),[182] Section 92 of the new Constitution dealt with such cases.[183]

The safeguard discussed above, would enable the State of Jammu and Kashmir to retain its autonomy in any case whereas other Indian States ''retain their autonomy during good behaviour''[184] only.

(iii) Financial Emergency

If the President is satisfied that a situation exists whereby the financial stability or credit of India or any part thereof is threatened, he may by a Proclamation of Emergency

179 Dr. S.N. Dhar *v.* J & K State, 1987 JKLR 109.
180 14th May, 1954.
181 *Jammu and Kashmir Constitution Act, 1996 Bk.* (Act XIV of 1996 Bk.).
182 *Constitution of Jammu and Kashmir*, Section 57.
183 For discussion of Section 92, refer to Chapter 8.
184 Gledhill, Alan, *Constitution of India*, p. 83.

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declare a State of Financial Emergency.[185] In such a case all the provisions of Article 352 apply. While this Proclamation is in operation, the executive authority of the Union extends to giving to any State directions to observe such canons of financial propriety as may be specified in the Order. Any such directions may also include:

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the State;
(ii) a provision requiring all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the legislature of the State.

When such a proclamation is in operation, it will be within the competence of the President to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the Union, including the judges of the Supreme Court and the High Courts.[186]

However, the provisions of Article 360 are *not* applicable to Jammu and Kashmir.[187] The result seems to be that the President of India cannot interfere in the financial affairs of the State. In view of the fact that the State shares in the revenues of the Union and gets grants-in-aid,[188] it seems unreasonable that, in a national emergency, the President of India cannot issue directions to the State for the regulation of its finances. Although the provision has been made in view of the special circumstances of the State,[189] yet the need is hardly justifiable.

(5) FINANCIAL POWERS

"Finance", observes Jain,[190] "is an essential pre-requisite of good government and federalism has its own special and peculiar

185 *Constitution of India*, Article 360.
186 *Ibid.*, 360 (4).
187 *C.O. 48*, Section 2(13)(a).
188 *Ibid.*, Section 2(16).
189 *Constituent Assembly Debates* (*India*), Vol. X, No. 10, p. 422.
190 Jain, M.P., *Indian Constitutional Law*, Bombay, 1962, p. 270.

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problems in this area." A Federation demands not only a division of functions, but also a division of taxing power between the centre and the states. Adequate financial resources are required for the efficient running of any government, and therefore in a federal system, with a distribution of responsibilities between centre and units the allocation of financial resources between the Centre and the State governments in such a way as not to strain the resources of either is essential. In India the Constitution itself provides for such a system.

It was the Government of India Act, 1919, which for the first time attempted, not very successfully, to separate central from provincial resources. With the experience gained in working that Act, better arrangements were made in the Government of India Act, 1935, under which the income-tax, other than agricultural income-tax, and corporation tax were imposed and collected by the Centre, though the provinces were entitled to a share in the net proceeds.

The Constitution of India, 1950, is generally patterned (so far as the financial powers are concerned) on the provisions of the Government of India Act, 1935. Under the 1950 Constitution, the two fiscal spheres are distinct from each other; whatever the Constitution allots to the Centre is withdrawn from the hands of the State and the States are not allowed to encroach on any matter which the Constitution has not specifically assigned to them. All matters not particularly earmarked for the States by the Constitution of India fall exclusively within the sphere of the Union. There is no possibility of Parliament and the State legislatures making laws dealing with the same source of revenue as there is no item concerning tax in the Concurrent List, List III of the Seventh Schedule.

So far as the imposition of the taxes is concerned, specific limitations have been imposed both on the Union and the States and apart from those limitations, the power is plenary and absolute. The first of these limitations is:

"No tax shall be levied or collected except by authority of law."

The word 'law' has received different interpretations from the different High Courts in India. One view being that 'law' in

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this Article refers to a statutory law, i.e. an Act of the Legislature.[191] And on this assumption the Rajasthan High Court has held the levy and collection of tax by usage ruled out.[192] The Madras High Court has taken the view that 'law' does not mean a statute law *alone* and therefore it has held that a levy on land, imposed before the Constitution under the sovereign prerogative of the Government, is not invalid.[193] 'Law' as defined in Article 13, includes 'any ordinance, byelaw, rule, regulation, notification custom, or usage having in the territory of India the force of law'. This definition leads us to the conclusion that the decision of the Madras High Court is more correct.

Further, a tax to be valid must not only be levied by a valid law, it must also be collected strictly in conformity with the manner prescribed and also it must relate to one of the several taxing entries listed in the Seventh Schedule.[194]

In *Ramji Lal's case*,[195] the Supreme Court held that the right not to be subjected to imposition or collection of taxes except by authority of law, which is conferred by Article 265 'is not fundamental right' (not being included in Part III of the Constitution) and hence unenforceable by an application under Article 32. The same view was expressed in the later case of *Laxmanappa*.[196] However, later the Supreme Court of India has pronounced in *K.T. Moopil Nair's case*[197] that the term 'law' in Article 265 must mean a valid law and in order the law may be valid the tax proposed to be levied must be within the legislative competence of the legislature imposing the tax and authorising the collection thereof and, secondly, the tax must be subject to conditions laid down in Article 13 of the Constitution. In *Balaji's case*[198] the Supreme Court reiterated the view expressed above that even a taxing law must stand the test of Article 13 and if such a law is inconsistent with any of the

191 *Joseph* v. *Asst. Excise Commissioner* [A.I.R. (1953) T.C. 146].
192 *Wadhwani* v. *Rajasthan* [A.I.R. (1958) Raj. 138].
193 *Gopalan* v. *State of Madras* [A.I.R. (1958) Mad. 539].
194 *Satyanarayan* v. *E.G.C. and Company* [A.I.R. (1959) Mad. 398].
195 *Ramji Lal* v. *I.T.O.* [A.I.R. (1951) S.C. 97].
196 *Laxmanappa* v. *Union of India* [A.I.R. (1955) S.C. 3].
197 *K.T. Moopil Nair* v. *State of Kerala* [A.I.R. (1961) S.C. 552.]
198 *Balaji* v. *I.T.O.* [A.I.R. (1962) S.C. 123].

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fundamental rights it cannot be valid. This view has been reaffirmed in *Jagan Nath's case*.[199] Thus, the result of these judicial pronouncements is that the courts power of judicial review has been extended to taxing statutes under Article 265 on the ground that they are subject to the provisions of Part III of the Constitution including Article 19(5).

The second limitation provides that, in general, neither the Union nor the State can levy tax on the income and property of the other.[200] But there were many cases of taxes being paid by the Government of India to local Government Boards which could not be legally recovered. Article 285(2) empowered such authorities to continue to collect until Parliament provided otherwise by law. The object of this provision was to prevent such authorities going bankcrupt by a sudden refusal to pay money which they expected. Also, Article 289 (2) lays down that trading or commercial functions entered into by the Government of a State are not exempt from Union taxation, unless declared by Parliament incidental to the ordinary functions of government.

The third limitation relates exclusively to the States and is embodied in Article 286 of the Constitution. Article 286, as originally enacted, provided that, notwithstanding the rules in the Indian Sales of Goods Act, for the purpose of that Article, a sale of goods should be deemed to take place within a state if, in the case of a sale of ascertained goods, they were in the state when the control of the sale was made. In the case of unascertained goods, a sale would be deemed to take place if the goods were in the state when the contract was completed. The object was to avoid multiple taxation, and a state could not tax a sale or purchase taking place outside the state.[201] In this way a state from which the goods were sent to another state could not tax.[202] The Supreme Court[203] held that the Article prohibited taxation of sales with interstate elements by all states except the state in which the goods were delivered for consumption. That

199 *Jagan Nath Baksh Singh* v. *State of U.P.* [A.I.R. (1962) S.C. 1563].
200 *Constitution of India*, Articles 285 and 289.
201 *Constitution of India*, Article 286(1).
202 *Bombay* v. *United Motors* [A.I.R. (1953) S.C. 252].
203 *Ibid.*

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state was free to tax by virtue of Articles 286(1) and 246(3) read with item 54 of List II, which at that time, was "Taxes on the sale or purchase of goods other than newspapers".

In *Ram Narain Sons' case*,[204] where in the course of inter-state transactions goods manufactured in M.P. were actually delivered for consumption in U.P., the Supreme Court held that the State of U.P. alone was entitled to impose a sales tax on that transaction as that was the state where the sale took place. The result of these decisions was that a dealer could be taxed with respect to his interstate transactions. The Patna High Court, relying on the *Bombay* v.*United Motors* [204a], held a company in West Bengal liable to taxation by Bihar on sales of goods delivered to purchasers in Bihar, though the West Bengal Company had no office in Bihar. The West Bengal Company appealed against the decision to the Supreme Court.[205] The Supreme Court reversed its earlier decision in *Bombay* v. *United Motors* [204a], and prohibited Bihar from taxing the purchases as the sales by the West Bengal Company were sales in the course of interstate trade and those could not be taxed because of the bar imposed by Cl. (1) (a) and Cl. (2) of Article 286. The decision in *Bengal Immunity Company* v. *State of Bihar* [205], created a privileged position for interstate trade and commerce. To avoid the inconveniences which could follow from that decision, the Parliament passed the Sales Tax Law Validating Act, 1956. It provided that any tax law of a state imposing a tax on inter-state sale between April 1, 1951 and September 6, 1955,[206] should be valid. But this Act did not permit the states to tax interstate sales after September 6, 1955. On September 11, 1956, on the recommendations of the Taxation Enquiry Commission, 1953-54, the Parliament passed the Constitution (Sixth Amendment) Act, 1956. This Act transferred the power to tax the interstate sales to the Union by the insertion of item 92A in List I, and the amendment of item 54 on List II. What was a 'sale outside the State'; a 'sale in the course of interstate trade or commerce' and a 'sale in the course of import and

204 *Ram Narain Sons* v. *Asst. Collector of Sales Tax* [A.I.R (1955) S.C. 765].
204a A.I.R. 1953 S.C. 252.
205 *Bengal Immunity Company* v. *Bihar* [A.I.R. (1955) S.C. 661].
206 Date of the decision of the *Bengal Immunity Case* was 6-9-1955.

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export' is a matter for Parliament to define. The Central Sales Tax Act, 1956 determined these clauses.

Article 286 (3) provides that no law made by the legislature of a state imposing or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless the Bill has been reserved for the consideration of the President and has received his assent. Of course, "these several bars may overlap in some cases...in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The State's legislative power with respect to a sale or purchase may be hit by one or more of these bars".[207]

Whereas Article 287 provides that no State may impose tax on the consumption of electricity by the Government of India, or on the sale of electricity to the Government for its consumption; Article 288 contains a prohibition on the power of a State to impose any tax in respect of any water or electricity stored, generated, consumed or sold by any authority established under any existing law or any law made by the Union Parliament for regulating or developing any interstate river or river valley.

The limitations explained above are generally followed in the case of the State of Jammu and Kashmir also. Articles 265, 285, 286, 287, 288, and 289 (discussed above) apply to the State of Jammu and Kashmir to the same extent as they apply to the other States in India.[208] The provision that taxes shall not be imposed save by authority of law as embodied in Article 265 has been incorporated in the Constitution of Jammu and Kashmir, 1957. Section 114 of the Kashmir Constitution reads:

> "No tax shall be levied or collected except by authority of law."

207 *Bengal Immunity Co.* v. *State of Bihar* [A.I.R. (1955) S.C. 661].
208 *C.O. 48*, Section 2(7).

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This clearly is an adaptation of Article 265 of the Indian Constitution.

Distribution of Income from Taxation

In the foregoing pages we have discussed the limitations which have been imposed on the taxing power of the Union and the States. Now we shall consider the scheme of distribution of income from taxation.

The general rule of a federal constitution is that, if the federation levies a tax in respect of matters assigned to its competence, it retains the proceeds accruing from such a tax. On the other hand if a tax is lawfully imposed by a unit, the proceeds from that go to the unit. The Constitution of India incorporates this general rule, but there are four exceptions to it:

(i) Under Article 268, the proceeds from Stamp duties and Excise duties on medical and toilet preparations as specified in the Union List—List I of the Seventh Schedule—are collected by and assigned to the States, although levied under a law of Parliament.

(ii) Under Article 269, the Union Government is authorised to levy and collect succession and estate duties other than in respect of agricultural land; terminal taxes on goods and passengers carried by rail, sea or air; taxes on railway fares and freights; taxes on transaction in stock exchanges and stock markets; and taxes on the sale or purchase of newspapers and on advertisements published therein. But the net proceeds in any financial year of any such duty or tax is assigned to the States and distributed among them in accordance with such principles of distribution as may be formulated by the Union Parliament by law.

(iii) Income-tax other than the agricultural income-tax is levied and collected by the Union Government, but has to be distributed between the Union and the States.[209] By

209 *Constitution of India*, Article 270.

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the *Constitution (Distribution of Revenue) Order, 1953*, the percentage of the net proceeds of the income-tax in any financial year is assignable to the States has been fixed at 55%. The distribution between the States presented certain difficulties because of the different basis put forward for the purpose. The different bases were (i) on collection bases, (ii) on population bases. The First Finance Commission had recommended that the State's share should be 80% on the population basis and 20% on the collection basis. The Second Finance Commission of 1957, recommended that the basis should be 90% on population and 10% on collection and on this basis it worked out the percentage of the various states. The percentage of the net proceeds of the income assigned to, and distributed among the States, is prescribed by the President, after considering the recommendations of the Finance Commission.[210] Parliament has no say in the matter.

(iv) The Constitution authorises the Union Parliament to provide that the whole or any part of the net proce ds of the excise duties other than the duties on medicinal and toilet preparations shall be distributed among the States in accordance with such principles of distribution as the Parliament may determine.[211] The State of Jammu and Kashmir like the other Indian States would collect the excise duties and stamp duties as specified in entries 84 and 91 of List I and appropriate their net proceeds, although the duties are levied by an Act of Parliament.[212]

The provisions of Article 269, which deal with the collection by the Union of Succession duty and Estate duty in respect of non-agricultural land; terminal taxes on goods and passengers carried by Railways, sea or air; taxes on railway freight and fares; taxes other than stamp duties on transactions in stock

210 *Constitution of India*, Article 270(4)(b)(ii).
211 *Ibid.*, Article 272.
212 *Ibid.*, Article 268(1)(b).

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exchange and future markets and their assignment as per the provisions of law made by Parliament apply to the State of Jammu and Kashmir in the same manner as they apply to the other Indian States. Also, the provisions of Article 270, relating to the collection by the Union of income-tax and its distribution, apply to the State to the same extent as they apply to the other Indian States. However, the following provisions relating to the financial arrangements between the States and the Union do not apply to Jammu and Kashmir State:

The provisions relating to State Consolidated fund;[213] the State Contingency fund;[214] the custody thereof,[215] and the public accounts of the State.[216]

These provisions have been incorporated in the Constitution of Jammu and Kashmir. Sections 115, 116, 118 and 119 of the Constitution of Jammu and Kashmir are adaptations of Articles 266, 267, 283 and 284 respectively. The object of not applying these Articles to Kashmir was to enable the State to provide for these matters in its own constitution since they concern each State individually. It was fully in accordance with the spirit of association of Kashmir with India.

Financial Grants

The Constitution of India provides for two different kinds of grants:

(i) particular grants;
(ii) general grants.

Under the first category fall the grants which the Union Government is required to make to the revenues of the States of Assam, Bihar, Orissa and West Bengal in lieu of assignment of any share of the net proceeds of export duty on jute and jute products.[217] Such payments are required to be made so long as

213 *Constitution of India*, Article 266.
214 *Ibid.*, Article 267(2).
215 *Ibid.*, Article 283(2).
216 *Ibid.*, Article 284.
217 *Constitution of India*, Article 273(1).

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any export duty on jute and jute products continues to be levied by the Union. The amounts of these payments is determined by the President in consultation with the Finance Commission.[218]

This Article is not applicable to the State of Jammu and Kashmir; it can only apply to the states specifically mentioned in it.

Under the second category come the recurring grants which the Union Government is required to make to a State to enable it to meet the cost of such schemes of development as may be undertaken by it with the approval of the Union Government for the purpose of promoting the welfare of the Scheduled Tribes or raising the level of administration of the Scheduled Tribes.[219]

The Union Parliament has the authority to make payments as grants-in-aid of revenues of such States as it may determine to be in need of assistance, and different sums may be fixed for different states. The Constitution of India does not contain any provision whereby the States may be asked to contribute to the federal fisc. Presumably the sources of revenue assigned to the exclusive competence of the Union Government are so large and extensive, that it is inconceivable that the need can arise for contribution from the States.[220]

However, Article 282 of the Constitution reads:

> "The Union or a State may make any grant for any public purpose notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws."

This Article is a residuary Article and according to San-

218 *Constitution of India*, Articles 273(2) and 275(2).

219 *Ibid.*, Article 275.

220 The only contribution dealt with in the Indian Constitution related to that which the Part B States were required to make in consequence of a financial agreement between them and the Union Government. This provision has now become obsolete as the distinction between Parts A, B and C States no longer exists after the Constitution (Seventh Amendment) Act, 1956.

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thanam[221] it enables "the Centre as well as the States to make contributions not only for purposes in the States or in the Centre but also to foreign States and agencies". He goes on to observe that, "the Comptroller and Auditor-General has ruled that a State, instead of making a grant to the Centre under the Article, may by agreement undertake direct expenditure on a Central subject".

In view of the special terms of association of Kashmir with India, which had safeguarded its internal autonomy, the provisions of Article 282 are not applicable to Kashmir.

Articles 290 and 291 relate to the privy purse of the rulers of former Indian Native States. Prior to the integration of these States, there was hardly any distinction between public expenditure and the private or personal expenses of the rulers in these native States.[222] After integration certain fixed sums were allowed to each ruler free of income-tax as his privy purse. The amounts were fixed after negotiations with the rulers and were different for different States.[223]

The Ruler of Jammu and Kashmir did not enter into any agreement with the Government of India regarding his privy purse. Article 291 which provides a constitutional guarantee for payment of privy purse was not applied to Kashmir.[224]

Article 299 of the Constitution protects the President of India as well as the Governors of the Indian States from being personally liable in respect of Acts done, and contracts and assurances made or executed on behalf of the Government. This immunity is purely personal to the President or the Governor and does not mean the immunity of the Government from a contractual liability if the contract is otherwise valid being in accordance with the conditions laid down in Article 291(1). Thus, whereas the Government is safeguarded against unauthorised contracts, the judicial opinion is in favour of the view that if the Government derives any benefit under the unauthor-

221 Santhanam, K., *Union-State Relations in India*, London, 1960, p. 40.

222 See Chapter 4.

223 Government of India, *White Papers on Indian States*, 1950, Appendix LIX.

224 It was so because there was no complete integration of Kashmir into the Indian Union. See Chapter 5 ante.

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ised contract, the Government may be held liable to compensate the other contracting party under the Indian Contract Act on the basis of the quasi-contractual liability.[225]

The provisions of this Article are not applicable to Kashmir and as such the acts of the Governor have not been protected by the Indian Constitution. However, it must not be thought that since Article 299 does not apply to Jammu and Kashmir, the Governor would be personally liable for acts done or contracts and assurances made on behalf of the Government of Jammu and Kashmir. Clause (2) of Section 122 of the Constitution of Jammu and Kashmir, viz.:

> "The Sadar-i-Riyasat shall not be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of the State heretofore in force, nor shall any person making or executing any such contract or assurance on his behalf be personally liable in respect thereof." (Sadar-i-Riyasat replaced by Governor by the Sixth Amendment Act).

This section is by and large an adaptation of Article 299 of the Constitution of India. The Constitution of India does not contain any provision with regard to the powers and privileges of the Governor of the State and as such the non-applicability of the Article becomes obvious.[226]

The provisions of Article 300 relating to suits and proceedings by or against the Government of India or the Government of a state and the extent of government liability, have been incorporated in Section 123 of the Constitution of Jammu and Kashmir, 1957. Till 1957, the pre-existing law relating to this matter remained in force in so far as the State of Jammu and Kashmir was concerned.

From the above discussion we find that by and large the provisions of Part XII of the Constitution of India dealing with Finance etc., apply to the State of Jammu and Kashmir in

225 *New Churulia Coal Co.* v. *India* [A.I.R.(1959) Cal. 585].
226 For powers and position of the Sadar-i-Riyasat see Chapter 8.

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the same manner as they apply to the other States of India. Those provisions of the Constitution of India which do not apply have been incorporated in the Constitution of the State.

By the *Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1958*,[227] the jurisdiction of the Auditor-General and the Comptroller has been extended to the State and Entry 76 of List I has been made applicable to the State. Thus, "after May 1957, the State has entered into financial arrangements with the Union Government which bring it at par with other States in respect of financial matters including proportionate allocation of funds from the Centre. In this matter Jammu and Kashmir is being allotted its due share of the financial allocation strictly in accordance with the principles that apply to the other States and no distinction exists."[228]

(6) FUNDAMENTAL RIGHTS

Sir Ivor Jennings writes that if an Englishman were to put his fundamental political beliefs into a single formula, it would go like this:

> "No man (or woman) may be arrested by a policeman unless he has broken the law, nor be kept in prison unless a magistrate or a judge and jury have found him guilty of an offence; nor may he be deprived of his property except by legal proceeding and then only on payment of compensation; nor may any Government official push him around unless the law says he may, and then only if the official strictly obeys all the legal formalities and makes certain that the man has a square deal. And if any body breaks these rules the person concerned is fully entitled to go along and complain to a justice of the peace, or write to the papers and make a fuss or ask his Member to raise the question in Parliament."[229]

227 *C.O. 56.*

228 Government of Jammu and Kashmir, *Kashmir's Integration with India—A Survey*, Srinagar, n.d., p. 2.

229 Jennings, Sir Ivor, *The Queen's Government*, 1955, London, p. 9.

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The Fundamental Rights incorporated in Part III of the Constitution of India, it is submitted, can be regarded as a detailed elaboration of the above formula.

Article 13 of the Constitution of India provides that the pre-Constitution Laws which are inconsistent with the Fundamental Rights shall be void to the extent of their inconsistency. The Supreme Court has held[230] that as the fundamental rights become operative only from the date of the commencement of the Constitution, therefore, the question of their inconsistency of the existing laws with those rights must arise on or from the date those rights come into being and so held Article 13 prospective and not retrospective.

Indian Citizenship was conferred on the people of Jammu and Kashmir in 1954 and it became important that the residents of Jammu and Kashmir be granted the Fundamental Rights enjoyed by the other citizens of India. But in view of the peculiar circumstances in which the State was placed, the Central Government agreed with the State Government to apply the Rights with modifications to meet the requirements of the State.[231] The Constitution (Application to Jammu and Kashmir) Order, 1954, enumerated the Fundamental Rights which were to be available to the people of Kashmir.

In Kashmir the Fundamental Rights came into existence only in 1954 and therefore Article 13 was modified to the extent that the reference to the commencement of the Constitution was to be construed as reference to the commencement of the Order. This modification was essential.[232] Had the Fundamental Rights been applied retrospectively i.e. from 1950, when Indian Citizenship was conferred, the Land Legislation of the State Government which gave land to the tiller without compensation to the landlords[233] would have become unconstitutional being repugnant to Article 31 of the Constitution.

Article 14 of the Constitution reads:

230 *Keshavan Madhava Menon* v. *Bombay* [A.I.R. (1951) S.C. 128].
231 *Lok Sabha Debates*, 1952, Vol. III, Pt. II, No. 16, Col. 4518.
232 See *Magher Singh* v. *P. Secretary* (A.I.R., 1953 J. and K. 25).
233 Act XVII of s. 2007 (1950 A.D.).

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> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

In brief this provision means in the first place that there shall be no special privilege[234] for anyone and that all are subjected to the ordinary law of the land; and in the second place it demands equality of treatment to all in the same situation, i.e. among the equals law should be equal. However, this does not prohibit the legislature to make reasonable classification for purposes of legislation and treats all in one class on an equal footing.[235] But the classification cannot be arbitrary and it must have a rational or reasonable relationship to the object sought to be achieved by the statute.[236] Thus where there is a substantial basis for making the classification and there is a nexus between the basis of classification and the object of statute under consideration, the classification may be founded even on the geographical basis.[237]

The Jammu and Kashmir Enemy Agents Ordinance provides a procedure for the trial of an 'enemy' and an 'enemy agent' materially different from the ordinary criminal procedure. The Supreme Court has held[238] the Act valid because the 'enemy' and 'enemy agent' as defined in the Ordinance are a clearly defined class and would give rise to a reasonable classification in the context of circumstances existing in the State. Where a statute is based on reasonable classification, it does not affect its validity that the class to which it applies consists of only one person.[239] The Supreme Court has summarised the law relating to Article 14 thus:

234 The Constitution itself provides immunity to the President of India; the State Governors; Judges and Rulers of former princely States. (Articles 361-363).

235 *Budhan* v. *State of Bihar* [A.I.R. (1955) S.C. 191].

236 *Bombay* v. *Balsara* [A.I.R. (1951) S.C. 318].

237 *Kelman Shagoo* v. *The State* [A.I.R. (1960) S.C. 1].

238 *Ibid.*

239 *Travancore Rayon Ltd.* v. *Peramvoor Municipality* [A.I.R. (1958) Kerala 149].

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"(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing condition on the part of a legislature are to be presumed, there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile or discriminatory legislation."[240]

These principles are designed to serve the Executive, Legislature

240 *Ram Krishan Dalmia* v. *Sri S.R. Tandolkar and others* (1959) S.C.R. 297.

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and Judiciary in dealing with a matter arising under Article 14.

The provisions of Article 14 apply to the State of Jammu and Kashmir to the same extent as the other States of India.

Article 15 relating to prohibition of discrimination on grounds *only* of religion, race, caste, sex, place of birth or any of them also applies to the State of Jammu and Kashmir but with the difference that since there are no 'Scheduled Tribes' in the State, therefore, the State can make special provisions only for 'Scheduled Castes' and 'Backward Classes' for the purposes of clause 4 of Article 15.

By virtue of Article 16, equality of opportunity has been guaranteed to all citizens of India in matters of employment or appointment to any office under the State. The object of the provision according to Jain is that "there should be no discrimination between one employee and another on the basis of any prejudice, bias or any extraneous ground".[241] Clause (4) of Article 16 makes provision for reservation of posts in favour of any backward class or citizens which in the opinion of the State are not adequately represented in the services of the State. The Article also enables the residents of one State to seek employment in the other States of India but Parliament has the power to prescribe by law any requirements i e. that of residence, for employment in that State.[242]

All the clauses except clause (3), viz.:

> "Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment",

apply to the State of Jammu and Kashmir also. The object for not applying the provisions referred to above was to avoid a conflict between the State law and the law of the Union Parlia-

241 Jain, M.P., *op. cit.*, p. 382.
242 Article 16(3).

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ment on the same subject. The Constitution of India has itself[243] given the Jammu and Kashmir Legislature the power to 'define the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir' and 'conferring on such parmanent residents any special rights and privileges as respects:

(i) employment under the State;
(ii) acquisition of immovable property in the State;
(iii) settlement in the State; or
(iv) right to scholarships and such other forms of aid as the State Government may provide'.

In view of this it was necessary to see that both Parliament and the State Legislature did not have power to make laws for one and the same subject and hence the modification to Article 16 in its application to Kashmir.

The provisions relating to abolition of 'untouchability' (Article 17) and the 'abolition of titles' (Article 18) apply to the State of Jammu and Kashmir to the same extent as they apply to the other States in India.

Article 19 of the Constitution of India guarantees seven distinct freedoms viz.:

(i) freedom of speech and expression,
(ii) freedom of assembly,
(iii) freedom of association,
(iv) freedom of movement,
(v) freedom of residence and settlement,
(vi) freedom of property, and
(vii) freedom of profession, occupation, trade or business.

These freedoms are, however, not absolute and clauses (2) to (6) lay down grounds and purposes for which the legislature can impose 'resonable restrictions' on these rights.

In *Chintaman Rao's case*[244] it was held that it is for the courts

243 Article 35-A. See also Chapter 5.
244 *Chintaman Rao* v. *Madhya Prades'i* (1950) S.C.R. 759.

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to determine whether any restriction is reasonable or not and if the court is of the opinion that a particular restriction is not 'reasonable' it will be held void. The Supreme Court has observed[245] that a restriction to be reasonable must have a rational relation with the object which the legislature seeks to achieve and must not go in excess of that object. Article 19 only applies to legislation directly intended to control the seven freedoms. And if the impugned act does not deal with any of these freedoms but some other subject then it is not repugnant to Article 19.[246] In applying the test for reasonableness of a restriction, the standard is that of an average prudent man[247] and the test of reasonableness must be applied to each individual statute and no abstract standard or general pattern can be applicable to all cases.[248]

All the seven freedoms guaranteed in Article 19(1) are available to the residents of Jammu and Kashmir State with the following differences which shall exist only during the period of ten years[249] from 14-5-1954.

(a) The freedoms of assembly, association, movement, residence, and of property guaranteed by sub-clauses (b) to (f) of Article 19 shall be subjected to restrictions on an additional ground[250] viz., the 'security of State'.

'Security of State' is a very wide term and would include within its folds any act, which either by external aggression or internal disturbance, threatens the safety of the State. This special provision has been made in view of the peculiar circumstances in which the State is placed at present. It is hoped that when normal conditions are restored, these curtailments on the rights of the citizens will be removed.

(b) There will be no judicial review of clauses (2) to (5) of Article 19 as the words 'reasonable restrictions' occurring in

245 *Arunachala Nadar* v. *Madras* [A.I.R. (195) S.C. 300].
246 *Gopalan* v. *Madras* [A.I.R. (1950) S.C. 27].
247 *N.B. Khare* v. *State of Delhi* [A.I.R. (1950) S.C. 211].
248 *Madras* v. *V.G. Row* [A.I.R. (1952) S.C. 196].
249 Substituted by C.O. 59, for five years originally.
250 *C.O. 48*, Section 2(4) (d).

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these clauses shall be construed as meaning such restrictions as the appropriate legislature deems reasonable.

To safeguard the Fundamental Rights of the citizens is essentially one of the functions of the Judiciary and as such it seems unreasonable that in Kashmir the Judiciary should not be given the power to guard the Fundamental Rights of the people of Kashmir. This 'peculiar' position in the Constitution of India in its application to Kashmir was to remain in force upto 1964.[251] The present writer submits that if the people of Kashmir are really to be given the benefit of the Fundamental Rights, no further extension be made in this provision and the position in the State be brought at par with the other parts of India.

The protection of persons from criminal conviction under *ex post facto* laws,[252] against double jeopardy[253] and against self incrimination[254] are available to the people living in all parts of India whether citizens of India or not.

Article 21 lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. The expression 'procedure established by law' has been held to mean "the procedure laid down by a competent legislature".[255] 'Procedure established by law' does not necessarily mean that the procedure must always be laid down in an enacted law. It may be laid down in rules framed under statutory or constitutional authority.[256] Rules made by the Supreme Court under Article 145 (1) have been held[257] to be law for the purposes of this Article. The main purpose of this Article is to put a restraint upon the executive to proceed against the life or personal liberty of a person save under the authority of a valid law and in accordance with the procedure laid down therein.

Article 21 applies to the State of Jammu and Kashmir also

251 It has been extended upto 1979 *vide* C.O. 97 of 1974.
252 *Constitution of India*, Article 20(1).
253 *Ibid.*, Article 20(2).
254 *Ibid.*, Article 20(3).
255 *S. Krishnan* v. *Madras* [A.I.R. (1951) S.C. 301].
256 Jain, M.P., *op. cit.*, p. 438.
257 *In re. Sant Ram* [A.I.R. (1960) S.C. 932].

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and thus provides a safeguard to the people of that State against despotic executive actions.

Article 22 of the Constitution of India deals with the protection against arrest and detention of persons. Clauses (4) to (7) of the Article provide certain limitations upon the Union and the State Legislatures to make any laws providing for 'preventive detention' i.e. for detention of a person without any trial and conviction by a court of law. These limitations prevent arbitrary arrests by the Executive under cover of such laws. The scheme of the limitations is as follows:

(i) government may detain a person in custody for not more than three months. However Parliament is entitled to make a general law laying down in what classes of cases, the detention may exceed three months.

(ii) apart from such law of Parliament, government may detain a person for more than three months without trial if it obtains the approval of an Advisory Board;

(iii) the authority making the detention shall, as soon as may be, communicate to the detenu the grounds of his detention and offer him opportunity of making a representation against the order.

The Supreme Court has held[258] that the Advisory Board's function (in cases of detention for more than 3 months) is not to determine the period of detention but only to determine whether the detention itself is justified or not.

The Government has the right not to disclose facts which it considers undesirable to disclose in the public interest, but it must disclose the grounds of arrest and the Courts cannot go into the question whether the disclosures of facts withheld is in public interest,[259] nor will a Court go into the question of correctness or falsehood of the facts which are mentioned as the grounds of detention.[260] However, the detenu would be re-

258 *P.L. Lakhanpal* v. *Union of India* [A.I.R. (1958) S.C. 163].
259 *State of Bombay* v. *Atma Ram* [A.I.R. (1951) S.C. 157].
260 *Bhimsen* v. *Punjab* [A.I.R. (1951) S.C. 481].

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leased by the court if there was unreasonable delay in furnishing grounds, or if the grounds were withheld, or if the grounds communicated were in such form as not to be readily intelligible, or otherwise prejudiced his right to make a representation as soon as possible. The precision of a charge in a criminal trial is not required, but particulars of time, place and substance must be indicated with sufficient clarity to enable the detenu to understand what the authority has against him.[261] But it has been held[262] that omission on the part of the Government to convey to the detenu the order confirming his detention order does not make the detention illegal or result in the infringement of the Fundamental Rights.

Article 22 extends to the State of Jammu and Kashmir with an important difference that the power of legislation with respect to preventive detention shall belong to the State Legislature instead of the Parliament. The Jammu and Kashmir Legislature shall have the sole legislative powers with respect to preventive detention and the existing law of the State with respect to preventive detention[263] shall continue to be in force until repealed or amended by the State Legislature. Clause (C), added to Article 35 says:

> "No law with respect to preventive detention made by the Legislature of Jammu and Kashmir whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the grounds that it is inconsistent with any of the provisions of this part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years (ten years by C.O. 59) from the commencement of the said order except as regards things done or omitted to be done before the expiration thereof."

The object was to "except the Jammu and Kashmir Preventive

261 *Ujagar Singh* v. *State of Punjab* [A.I.R. (1952) S.C. 350].
262 *Mohd. Afzal Khan* v. *The State of Jammu and Kashmir* [A.I.R. (1957) S.C. 173].
263 Jammu and Kashmir Preventive Detention Act, 2011 (A.D. 1954).

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Detention Act from the operation of the Fundamental Rights."[264] This clause came for review before the Supreme Court of India and it observed thus:

> "the effect of this modification [addition of clause (c) to Article 35], ...of the Constitution is that such of the provisions of the Act (Preventive Detention Act) as are inconsistent with Part III of the Constitution shall be valid until the expiration of five years from the commencement of the Order. This is an exception which has been engrafted in the Constitution in respect of Fundamental Rights relating to personal liberty for the limited period of five years".[265]

This special provision with regard to preventive detention is a special indulgence granted to the State.[266]

Article 25-30 of the Constitution of India deal with the guarantee of religious and cultural rights. These provisions apply to Jammu and Kashmir to the same extent as to the other States in India and no difference is made.

The rights to property under the Indian Constitution are articled in Articles 19 (1) (f) and 31 of the Constitution of India. The interpretation and the correlation of these Articles has been a matter of great difficulty on account of the differences in the wordings and application of these Articles. The substance of the current judicial view of the Supreme Court[267] is that Articles 19 (1) (f) and 31 (1) deal with the same subject matter and that legislation depriving property under Article 31 (1) is subject to scrutiny by the courts for 'reasonableness of restrictions' under Article 19 (5).

Under Article 31 (1) no person can be deprived of property except with the authority of law and accordingly the Supreme

264 *Subhan* v. *The State* [A.I.R. (1956) J. and K. 1].

265 *P.L. Lakhanpal* v. *The State of Jammu and Kashmir*, (1955) 2 S.C.R. 1101.

266 After MISA was repealed in the country, the State legislature has enacted "The Public Safety Act, 1978" which authorises the detention on the same pattern as the Preventive Detention Law.

267 *K.K Kochuni* v. *Madras* [A.I.R. (1960) S.C. 1080].

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Court of India in the case of *Hamdard Dwakhana*[268] ordered the goods which had been seized without authority of law to be returned to the owner. Clause (1) restricts the power of the Executive to seize the property but not that of the Legislature.[269]

Article 31(2) provides:

(i) the State cannot compulsorily acquire or requisition any property except for public purposes;
(ii) it cannot do so save by authority of law which must provide for payment of compensation to the owner in the manner laid down.

"It is a right inherent in every sovereign to take and appropriate property belonging to individual citizens for public use"[270] but only on payment of compensation and the Supreme Court before the amendment in 1955 held that the compensation must be equivalent to what the owner has been deprived of.[271] Explaining what a public purpose is, the Supreme Court has observed that 'public purpose' is what favours the general interest of the community as opposed to a particular individual.[272]

The decision in *Bella Banerjee's case*,[273] i.e. equivalent compensation on the acquisition of property, resulted in the amendment of Article 31(2) by the Constitution (Fourth Amendment) Act, 1955. The amendment makes the adequacy of compensation a non-justiciable issue. Courts cannot now go into the question whether the quantum of compensation provided for the property being acquired or requisitioned by the State is adequate or not. But even after the amendment, compensation cannot be altogether refused. Article 31 (2) (a) provides that even if person is by law deprived of his property, it is

268 *Hamdard Dwakhana* v. *India* [A.I.R. (1960) S.C. 554].
269 *West Bengal* v. *Subodh Gopal* [A.I.R. (1954) S.C. 92].
270 *Charanjit Lal* v. *Union of India* [A.I.R. (1951) S.C. 41].
271 *West Bengal* v. *Mrs. Bella Banerjee* [A.I.R. (1954) S.C. 170].
272 *State of Bihar* v. *Kameshwar* [A.I.R. (1952) S.C. 252].
273 See Footnote 72.

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not deemed to be compulsory acquisitioning or requisitioning of property unless the ownership or right to possession of property is transferred to the State or a corporation owned or controlled by the State.[274] Failure to pay compensation in such a case is no infirmity.[275]

By clause (3) of Article 31, if a State Legislature passes an expropriatory law, it must receive the assent of the President; otherwise it is invalid. In *Rameshwar's case*,[276] a State Act falling within the purview of Article 31 (2), but not reserved for the President's assent under Article 31 (3), was declared to be invalid. It seems that the main purpose of Article 31 (3) is to provide central control over State Legislations so as to ensure that no hasty, unjust or expropriatory legislation is enacted by a State Legislature.

Clause (4) of Article 31 protects laws born out of Bills pending at the commencement of the Constitution in the State Legislatures from avoidance for repugnancy to Article 31 (2). Under Article 31 (5) (a) any law validly enacted before the Constitution is protected from the operation of Article 31 (2). The Bombay High Court has held that the term 'existing law' in this Article cannot cover a law which was beyond the competence of the enacting legislature.[277] Article 31 has been modified in its application to the State of Jammu and Kashmir. Clauses (3), (4) and (6), discussed above, have been omitted. The result of these omissions is that there is no question of obtaining the assent of the President for enacting any law of compulsory acquisition of property under clause (2) of Article 31.

For clause (5) a new clause has been substituted:

"(5) Nothing in clause (2) shall effect:

(a) the provisions of any existing law; or

274 *Sant Singh* v. *State of Jammu and Kashmir* [A.I.R. (1959) J. and K. 35].
275 *Kuberdas* v. *Bombay* [A.I.R. (1960) Bom. 459].
276 *Rameshwar* v. *Mishra* [A.I.R. (1959) Pat. 488].
277 *Assistant Collector* v. *Jamnadas* [A.I.R. (1960) Bom 35].

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(b) the provisions of any law which the State may hereafter make:

(i) for purposes of imposing or levying any penalty; or
(ii) for the promotion of public health or the prevention of danger to life and property; or
(iii) with respect to property declared by law to be evacuee property."

The object underlying this provision was to protect the legislation of the State which gave land to the tillers without any compensation to the landowners.[278] The Supreme Court has held[279] that the non-applicability of Article 31 in its entirety to the State was designed to protect the land reforms in Kashmir.

In the rest of India it was to facilitate the abolition of Zamindari Estates in the larger interest of the country, that two additional clauses, 31-A and 31-B, were inserted in the Constitution[280]—one facilitating the acquisition of estates and the other validating certain Acts and Regulations.

As the right to property is guaranteed and as the acquisition is permissible only for public purposes and on payment of compensation, it was realised that the acquisition of landed estates would involve taking away some of the rights guaranteed by Part III of the Constitution of India. Abolition of Zamindari was considered essential for the economic progress of the country and so provision was made to meet this case by expanding the scope of Article 31-A by the Constitution (Fourth Amendment) Act, 1955. The expanded provision lays down that the acquisition of agricultural land and agricultural estates shall not fail on the ground that it contravened any of the fundamental rights. Article 31-B saves the laws specified in the 9th Schedule of the Constitution from the combined operation

278 *The Jammu and Kashmir Big Landed Estates Abolition Act, 1950* (Act XVII of s. 2007) (A.D. 1950).

279 *Prem Nath Kaul* v. *The State of Jammu and Kashmir* [A.I.R. (1959) S.C. 749]. See also *Magher Singh* v. *Principal Secretary* [A.I.R. (1953) J. and K. 25].

280 Constitution (First Amendment) Act, 1951.

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of the Fundamental Rights embodied in Part III of the Constitution. However, if the Acts named in the 9th Schedule are amended subsequently, the protection of Article 31-B is not to extend to the amendments which have to be judged on their own merits.[281] These Articles (Arts. 31-A and B) extend to Jammu and Kashmir also and the Big Landed Estates Abolition Act, 1950 has been included in the 9th Schedule. The Jammu and Kashmir Agrarian Reforms Act, 1978 also stands included in the schedule.

Right to Constitutional Remedies

The declaration of the Fundamental Rights would have become meaningless, if there was no way of getting them enforced and unless the enjoyment was effectively guaranteed by provision for judicial review.

Article 32 (1) guarantees the right to move the Supreme Court for the enforcement of the Fundamental Rights, and Article 32 (2) empowers the Supreme Court to issue writs, orders or directions in the nature of *habeas corpus*, *mandamus*, *certiorari*, *quo warranto* and Prohibition for the enforcement of the Fundamental Rights. The High Courts are also empowered to issue the writs, orders or directions for the enforcement of the Fundamental Rights and also for any other purpose.[282] The power of the High Courts in this respect is thus wider than that of the Supreme Court. A person complaining of an infringement of his Fundamental Rights may come straight to the Supreme Court for relief and he is not bound to invoke the jurisdiction of the High Court first. But if he has invoked the provisions of Article 226 and his petition has been dismissed after hearing, the Supreme Court can treat the High Court judgment as *res judicata* for a petition to it under Article 32.[283] Article 226 was omitted from its application to J & K State by paragraph 2(5A) of the 1954 Order. Entries 78 and 79 of List I of the Seventh Schedule were made applicable to the State by the 1965 amendment order but Entry 79 was again omitted by amendment order 1969.[283a]

The High Court of Jammu and Kashmir has been given the power to issue writs for the enforcement of the Fundamental

281 *Sant Singh* v. *The State* A.I.R. (1959) J & K 35.
282 *Constitution of India,* Article 226.
283 *Daryao.* v. *U.P.* A.I.R. (1961) S.C. 1457.
283a *Isher Dass* v. *The Income Tax Officer* 1971 JKLR 168.

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Rights by virtue of clause (2A) to Article 32. Article 226 is not applicable to Kashmir.

The power under clause (2A) is in *pari materia* with the power of the other High Courts in India with the difference that the State High Court can issue writs for the enforcement of the Fundamental Rights only and *not* for any other purpose.[284]

Article 32 (3) empowers Parliament by law to empower any other Court to exercise within the limits of its territorial jurisdiction all or any of the powers exercisable by the Supreme Court under Article 32 (2).

This clause does not apply to the State of Jammu and Kashmir. This implies that Parliament cannot give powers to issue writs in the nature mentioned in Article 32 (2) to any subordinate Court in Kashmir.

Article 33, empowering Parliament to determine to what extent any of the Fundamental Rights should, in their application to the members of the armed forces or the forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them; and Article 34 enabling the Parliament to enact an Act of Indemnity to protect the Government Officers from any legal liability for action taken by them during the period of Martial Law, apply to the State of Jammu and Kashmir to the same extent as the other States in India.[285]

From the above discussion we find that the Constitution (Application to Jammu and Kashmir) Order, 1954, has granted to the people of Jammu and Kashmir, the Fundamental Rights embodied in the Indian Constitution. The State people can,

284 *Khajoor Singh* v. *India* (1961) S.C.J. 235.
The State of Jammu and Kashmir v. *Ghulam Rasool*, (1962) S.C.J. 552.
After 1957 the position has changed. Section 103 of the Constitution of Jammu and Kashmir, 1957, empowers the High Court to issue writs, orders or directions for *any other purpose* also. This has brought the jurisdiction of the State High Court at par with the other States of India. See also Chapter 8.

285 Article 35 has been discussed in Chapters 6 and 7.

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therefore, for the first time in their history, claim and contend against the Executive. Although the operation of the fundamental rights in Kashmir is restricted, yet adequate precautions have been taken to provide for an effective and speedy enforcement of these rights by authorising the Supreme Court and the High Court to issue writs, orders or directions for the enforcement of these rights.

(7) AMENDMENT OF THE CONSTITUTION

To meet the challenge of changing "social and political circumstances",[286] the need may arise from time to time to amend the constitution and the need may be even greater in a constitution of a federal character. "A federal constitution is generally rigid from the very nature of the polity"[287] and the process for its amendment is more difficult than that of amending the ordinary laws, but even then a rigid constitution is preferred[288] in most federations on the principles of stability. Although, the Constitution of India is partly rigid and partly flexible, yet, according to Professor Gledhill, "Indian Founding Fathers were less determined than were their American predecessors to impose rigidity on their constitution,"[289] in order to minimise the difficulty in the process of its amendment.

The procedure for the amendment of the Constitution of India is contained in Article 368 of the Constitution. According to it, an amendment of the Constitution may be initiated in either House of Parliament only by the introduction of a Bill for that purpose. When the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President

286 Sen, D.K., *Comparative Study of the Indian Constitution*, pp. 290-91.

287 Joshi, G.N., *The Constitution of India*, p. 370.

288 Cf. Sir Ivor Jennings, "Flexibility is regarded as a merit and the rigidity a defect because it is impossible for the framers of a constitution to foresee the conditions in which it would apply and the problems which will arise". For criticism of Sir Ivor's view, *see* Sen, D.K., *op. cit.*, p. 302.

289 Gledhill, Alan, *Constitution of India*, p. 74.

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for his assent and upon his assent being given to the Bill, the Constitution stands amended in accordance with the terms of the Bill.

However, the proviso to Article 368 provides that if such amendment seeks to make any change in:

(a) Articles 54 and 55, which deal with the election and the manner of election of the President of India; Articles 73 and 162 which deal with the extent of the executive power of the Union and the States respectively; Article 241 dealing with the High Courts in the States, or

(b) Chapter IV of part V and Chapter V of part VI of the Constitution dealing with the Union judiciary and the High Courts in the States respectively, or Chapter I of part IX which deals with the legislative relations between the Union and the States, or

(c) any of the lists in the Seventh Schedule, or

(d) the representation of the States in Parliament, or

(e) the provisions of Article 368 dealing with amendment, the amendment will also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those legislatures before the Bill making provisions for such amendment is presented to the President for assent.

The necessity of this limitation becomes important because all these matters are vital in a federal polity. The provision is also in conformity with the federal principle which requires the consent of the State Legislatures to any amendment in the Constitution which affects the basic principles of the federal polity agreed to in the original federal compact. All the same, the limitation does not affect the supremacy of Parliament, as the initiative in amending the Constitution must be taken in Parliament (except in the matter of having one or two Houses in a State Legislature) and unanimity of the State Legislatures is not essential for such an amendment to become law. Moreover the whole constitution is susceptible of amendment and Parliament can amend it by following the prescribed courses.

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The general scheme of amendment would be followed in the case of Jammu and Kashmir State also but it is subject to a further limitation in the second proviso to Article 368[290]:

> "Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of Article 370."

This means that none of the specially entrenched provisions of the Constitution, even when amended by the procedure provided in the Constitution will be applicable in Kashmir in its new form without the formality of an order by the President of India under clause (1) of Article 370.

We have seen in chapter 5 that although the State of Jammu and Kashmir is an integral part of India, yet, its status greatly differs from the other States and the Constitution of India applies to the State not *proprio-vigore* but by virtue of the Instrument of Accession and subject to its terms and conditions. The position of the State of Jammu and Kashmir has been dealt with in Article 370 of the Constitution of India and it will be under clause 1 of that Article alone that any change can be brought about in the existing relationship of the State with the Union of India. Moreover, the President of India can issue an order under Article 370 *only* in concurrence with the Government of that State.[291] This means that no such amendment which is not acceptable to the Government of Jammu and Kashmir can be applied to the state even if the procedure for the amendment as laid down under Article 368 has been followed.

The proviso to Article 368, discussed immediately above, is in conformity with the Constitutional position of the State of Jammu and Kashmir within the framework of the Indian Constitution and is designed to protect that position.

For list of Important Central Acts applicable to the State of Jammu & Kashmir, see Appendix VII.

290 Inserted by *C.O. 48.*

291 *See* p. 128 ante for discussion of Article 370.

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7

The Constitution of Jammu and Kashmir, 1957*—I

(1) BACKGROUND AND NATURE

The idea of convening a Constituent Assembly for Jammu and Kashmir State was conceived before the partition of India was contemplated and would have been implemented but for the invasion of the State after the partition of India by the tribesmen from Pakistan territory. When in 1948, the National Conference formed the interim Government in the State, it was expressly declared that, as soon as normal conditions were restored, steps would be taken to convene a National Assembly, based upon adult suffrage, to frame a constitution for the State.[1] The convening of the Constituent Assembly in 1951 was a natural outcome of the desire of the people of the State to have a democratic government responsible to the Legislature, elected by the people.

The establishment of the Jammu and Kashmir Constituent Assembly in September 1951 was an event of great significance in the political history of the State. This assembly was invested with authority to frame the Constitution for the State. The "Today is our day of destiny. A day which comes only once in the life of a nation ...after centuries we have reached the harbour of our

* For full text of the Constitution —See Appendix IV.

1 Proclamation of Maharaja Sir Hari Singh, March 5, 1948.

1a Jammu & Kashmir Constituent Assembly Debates.

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freedom which for the first time in history will enable the people of Jammu & Kashmir, whose duly elected representatives are gathered here, to shape the future of their country after wise deliberation and mould their future organs of the Government. No person and no power can stand between them and the fulfilment of this their historic task....." The task of Constitution making entered a decisive phase when in the 12th Session of the Constituent Assembly, held from Septemeber 29, 1956 to November 19, 1956, the drafting committee on October 10, 1956 presented the draft Constitution. After detailed discussions the Constitution was approved and adopted on the 17th November, 1956. The Constitutional provisions were by and large patterned on the relevant provisions of the Constitution of India, with some exceptions, such as the powers of the Head of the State and the Directive Principles of the State policy. The Constitution came into force on the 26th January, 1957.[2] For the first time in the history of Kashmir, the State assumed the status of a constitutional state — because the constitution represents the supreme will of the people.

Broadly speaking, the Constitution of Kashmir, like the Constitution of any other state, is a document defining the principal organs of government, their functions and relations with each other and the principles governing the exercise of their functions. At the very outset it declares the state to be "an integral part of India".[3] Section 5 of the Constitution of Kashmir defines the extent of the Legislative and Executive powers of the State as extending to "all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India".[4] The Constitution of Kashmir is in no way repugnant to the Constituion of India but is complementary to it. It has to be read with that Constitution in so far as that is applicable to the State. It is in conformity with the Constitution of India and is so evolved that a clash seems unlikely.[5] The two Constitutions are such that the State can claim no power not conferred upon it by the Constitution, while the State can exercise any power not surrendered to the Government of India. The Constitution declares and contains everything that concerns the State as an individual unit of the Federation of India. The characteristic of the new constitution marks a complete change from the

2 *Constitution of Jammu and Kashmir,* Section 1(2).

3 *Ibid.,* Section 3.

4 *Constitution (Application to Jammu and Kashmir) Order, 1954 (C.O. 48). See* Chapter 6 above.

5 The Concurrent List (List III) is not applicable to the Jammu and Kashmir State. See Chapter 6 for detailed discussion.

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past monarchical form of government to a parliamentary, removable and elected executive. The Constitution has secured for the people of the State their individual character only in so far as it is consistent with their common Indian Nationality.

Nature of the Constitution

The Constitutions of the world have been categorised as written and unwritten. While agreeing that the "distinction they aim at expressing is a real distinction", Lord Bryce regards this classification as an "old-fashioned classification".[6] He suggests an alternative classification—'rigid and flexible'. The distinction between "written and unwritten" constitutions has lost any practical meaning in the modern day world. Apart from Great Britain there is hardly any State which has an 'unwritten' Constitution and even the constitution of Great Britain is not 'unwritten' but it is not 'written' in the sense that there is no single document setting out the basic principles of Constitutional law. The expression 'unwritten' constitution changes the entire philosophy of the nature of a constitution. The first impression which the term 'unwritten' gives is that it is something 'non-existent', and that is hardly true for Great Britain, the Constitution of which is regarded as a model constitution for a democratic state. The real difference between the two types of constitutions, lies in the fact that one is 'rigid' and the other is 'flexible'. According to Professor Dicey, "A flexible constitution is one under which every law of every description can legally be changed in the same manner by one and the same body", and a "rigid constitution is one under which certain laws, generally known as constitutional or fundamental, cannot be changed in the same manner as ordinary laws."[7] But it must not be assumed that flexible constitutions are unstable; such Constitutions "can be stretched or bent to meet emergencies, without breaking"; and when the emergency has

6 Bryce, James, *Studies in History and Jurisprudence*, Oxford, 1901, p. 148.

7 Dicey, A.V., *Introduction to the study of the law of the Constitution*, London, 1959, p. 129.

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passed, they slip back into their old form, "like a tree whose outer branches have been pulled on one side to let a vehicle pass".[8] "The stability of any constitution depends not so much on its form as on the social and economic forces that stand behind and support it".[9] In a country with a flexible constitution, the legislature can amend any Act forming part of the Constitutional law without any exceptional difficulty, but it is not so in the case of a country with a rigid constitution. A rigid constitution is usually brought into existence by a Constituent Assembly which does not come into being to enact ordinary legislation but to create an instrument of government within the limits of which sovereignty must be exercised. If the Constituent Assembly makes parts of the Constitution unalterable or only alterable by a more difficult process than that required for ordinary legislation, it makes them rigid and they are regarded as fundamental laws. But "prohibition debarring the legislature from passing certain kinds of measures may prove unfortunate when a measure of that kind would be the proper remedy".[10]

Adopting this classification of rigid and flexible[11] constitutions, we now come to study the nature of the Constitution of Jammu and Kashmir.

The Constitution of Jammu and Kashmir is a written document, having 158 sections and six schedules. As compared with the Constitution of India, which is the "lengthiest written constitution of the world so far produced",[12] it is a short document. But "short" is not used in a pejorative sense. The American Constitution with all its amendments consists of some 7,000 words only. The Constitution of the Fourth French Republic (1946) contains only 106 sections.

The Kashmir Constitution is partly rigid and partly flexible.

8 Bryce, James, *Studies in History and jurisprudence*, p. 168.

9 *Ibid.*, p. 166.

10 *Ibid.*, p. 228.

11 The terms *flexible* and *rigid* are used without any connotation either of praise or of blame. The main object of this writer is to make cle r the nature of the Constitution of Kashmir.

12 Pasu, D.D., *Commentary on the Constitution of India*, 3rd edn., Vol. I, p. 9.

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The proviso to section 147 specifies those features of the constitution which are unalterable or rigid. The legislature is debarred from considering any amendment of the Constitution affecting the State's accession to India[13] or the extent of the executive and legislative power of the State.[14] There are other matters like defence, external affairs and communications, regarding which the Union Parliament alone has power to make laws for the State. These provisions in the Constitution, being outside the scope of the legislative power of the Kashmir legislature, may be regarded as rigid for the purposes of the Kashmir Constitution but they are flexible in so far as the powers of the Union Parliament are concerned. All other sections of the Constitution are flexible, because an amendment to them can be initiated by the introduction of a Bill in the Legislative Assembly. The amendments come into effect if the Bill is passed by each house by a majority of not less than two-thirds of the total membership of the house.[15]

The Constitutions of several important countries are such that some clauses are rigid and unalterable and some flexible. For instance, the French Constitution declares that the republican character of the Government cannot be changed,[16] and in the U.S.A. no federating State can secede and become independent.[17] As such we find that there is no novelty in the fact that the Constitution of Kashmir is partly rigid and partly flexible.

Preamble

The preamble to a Constitution generally "expresses the political, moral and religious values which the Constitution is intended to promote".[18]

13 *Constitution of Jammu and Kashmir*, Section 3.
14 *Ibid.*, Section 5.
15 *Constitution of Jammu and Kashmir*, Section 147.
16 *Constitution of France*, Article 95.
17 See President Abraham Lincoln's First Inaugural Address, March 4, 1861.
18 Shukla, V.N. *Commentary on the Constitution of India*, Lucknow, 1959, p. 1.

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The Preamble to the Constitution of Kashmir reads:

> "We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves—
> Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship;
> Equality of status and of opportunity; and to promote among us all;
> Fraternity assuring the dignity of the individual and the unity of the nation.
> In our Constituent Assembly this seventeenth day of November, 1956, do hereby adopt, enact and give to ourselves this constitution."

This is clearly an adaptation of the Preamble to the Constitution of India.

The main function of a preamble is to explain certain basic facts which must be understood before the Act itself can be followed. The preamble to the Constitution of Kashmir serves three purposes:

(a) it indicates the source from which the Constitution derives its authority;
(b) it indicates the scope of the Constitution; and
(c) it states the objects which the Constitution seeks to establish and promote.

When in 1944, the National Conference started the 'Quit-Kashmir' movement, it acted on the assumption that "sovereignty flows from the people". The Magna Carta of the National Conference—'New Kashmir'[19] was based on that principle. So, when the Constitution of Kashmir was being

19 All Jammu and Kashmir National Conference, *New Kashmir*, Srinagar, 1946.

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framed, it was emphasised that it was in accordance with the wishes of the people that the Constitutiod was being framed. The words, "We, the people of the State of Jammu and Kashmir..." echo the opening words in the preambles of U.S.A., Eire and India. The source of the Constitution of Kashmir is the will of the people who have achieved the right to frame their own constitution after a great sacrifice.

The scope of the Constitution is reflected in the words "*to further define the existing relationship of the State with the Union of India as an integral part thereof...*". We have seen in Chapters 5 and 6 that the relationship of the State with the Union was originally based on the Instrument of Accession. The Constitution (Application to Jammu and Kashmir) Order, 1954 made the Constitution of India applicable to the State with certain exceptions and modifications in 1954. The idea of applying the Constitution of India to Kashmir in a limited sense was to make provision whereby the people of the State could frame their own constitution.[20] The structure of the Constitution of Kashmir, as such, has been erected on the foundations provided in the exceptions to and modifications of the Indian Constitution in the Constitution (Application to Jammu and Kashmir) Order, 1954.

Section 3 of the Constitution of Jammu and Kashmir says: "*The State of Jammu and Kashmir is and shall be an intergral part of India*" *and section 5 declares, the executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India*". Thus, we find that the scope of the Constitution has been enacted in the Act itself, and there is no ambiguity in the language which can create any doubt. The scope of the Constitution, besides defining the relationship with India in Section 3, extends to making provisions for "*all matters except those with respect to which Parliament has power to make laws for the State.* · "These matters refer to the internal administration of the state and accordingly the Constitution sets out the framework and the principle func-

20 *Constitution of India*, Article 370(2).

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tions of the organs of the government and the principles governing their functions.

The Constitution of Kashmir professes to secure to all its citizens social, economic and political justice. It also aims at securing equality of status and opportunity by prohibiting discrimination by the State on the grounds of sex, religions, race, class and creed. It also strives to guarantee the rights which are essential for the development of the individual and the nation, viz., the liberty of thought, expression and belief. The Preamble also refers to the spirit of brotherhood between the people of different regions, religions, races, and classes and attempts to creat a feeling that they are all children of the same soil—the same Motherland.

The Constitution was adopted on the Seventeenth day of November, 1956,[21] and Sections 1-8 and 158, which deal with the State territory, permanent residents, the relationship of India and the State and the Application of the General Clauses Act of s.1977 (1920 A.D.) for the interpretation of the Constitution came into force at once. The remaining sections came into force on 26th January, 1957, which day is referred to as the "Commencement of the Constitution".[22] That the people of Kashmir have chosen January 26, the Republic Day of India, as the date for full enforcement of their Constitution is evidence of the emotional integration of the State with the rest of India.

Relationship with India

We have seen in Chapter 4 that on the 26th October, 1947, Kashmir acceded to India in the manner prescribed by the Government of India Act, 1935, as in force on that day.[23] This accession was both complete in law and in fact but the Indian leaders had agreed to give the people of Kashmir a chance to finalise their future affiliations.

In 1951 the State Constituent Assembly was convened to

21 *Constitution of Jammu and Kashmir*, Preamble.
22 *Ibid.*, Section 1.
23 See *Government of India Act, 1935*, Section 6.

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give "its reasoned conclusions regarding accession".[24] The dispute regarding Kashmir had come to standstill at the U.N.O. The Assembly in Kashmir, in order to end the uncertainty about the future of the State, after due consideration, ratified the State's accession to India in 1954.

In 1956, when the drafting of the State Constitution was being finalised, it was deemed necessary to incorporate the ultimate position of the State in respect of the sphere of its accession as a "permanent provision"[25] in the State Constitution. It was with this idea that Section 3 of the Constitution was adopted. This section reads "The State of Jammu and Kashmir is and shall be an integral part of the Union of India."

The words used in this section are "*is and shall be*". These leave no ground for thinking that the people of the State ever had a doubt about their affiliations with India. The section is merely the affirmation of their desires to be an "integral part of the Union of India". In fact we find in the Preamble to the Constitution that the Constitution has been enacted apart from other things, to "further define the existing relationship with the Union of India as an integral part thereof". The Constitution has been framed on this assumption alone. Also, Section 3, declaring the State an integral part of India, has been put beyond the powers of the Legislature to amend.[26] This was done in order to "avoid any fissiparious tendencies raising their ugly head in the future".[27] "The wishes of the people of J & K as mentioned in the letter of acceptance to the Instrument of Accession have been duly ascertained through the promulgation of the Constitution of J & K by the Constituent Assembly, convened and elected on the basis of adult franchise. The State's accession to the Union of India cannot be questioned after its ratification by the Constituent Assembly on February 15, 1994 - and after the approval of the Constitution of J & K by the Constituent Assembly on 17th November 1956."*

The incorporation in Section 3 demanded the surrender of

24 *Sheikh Abdullah's Inaugural address to the Jammu and Kashmir Constituent Assembly, Srinagar, 1951,* p. 1.

25 Government of Jammu and Kashmir, *Kashmir and India—constitutional aspect,* p. 17.

26 *Constitution of Jammu and Kashmir,* Section 147.

27 *Daur-i-Jadid (weekly)*'Kashmir Constitution Souvenir', New Delhi, January 26, 1957, p. 58.

* F.S. Nariman *The Principles of Self Determination in International Law and in Relation to Jammu and Kashmir,* 1Law & Jus (1994) p. 246.

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certain rights to the Union Parliament. Accordingly, Section 5 provides :

> "The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."

Section 5 of the Constitution of Jammu & Kashmir is merely confined to matters over which the State Legislature can legislate.[27a]

The provisions of the Constitution of India, as applicable to the State of Jammu and Kashmir, were contained in the Constitution (Application to Jammu and Kashmir) Order, 1954.[28]

The Constitution of Kashmir has been so framed that the State can claim no power not conferred upon it by the Constitution, but it can exercise any power belonging to a State except those of which it has been direcly or indirectly deprived by the Constitution. For instance, the State can claim no power in matters of Defence, Foreign Affairs or Communications, which it has surrendered to the Union Parliament.

Since no change can be made in the extent of the executive and legislative power of the Union with regard to the State, except with the concurrence of the two Governments, Section 5, dealing with the extent of legislative and executive power of the State, has also been put beyond the powers of the legislature to amend.[29] If this safeguard had not been provided, the possibility in the future of a clash between the two Governments could not be ruled out. It was also to avoid any conflict between the two Governments that the Concurrent List of the Constitution of India was not made applicable to the State.

These two sections in the Constitution of Kashmir, have, by reason of the legislature's inability to amend them, sealed the doors to secession by the State from the Union. By no legal or constitutional means can the State secede from the Union. No future Legislature of the State can do anything about it.[30]

"From a perusal of Art. 370(2) it is manifest that the Constitution of India itself envisaged the framing of the

27a *S. Mubarik Shah Naqashbandi* v. *ITO* 1971 JKLR 7.

28 *G.O. 48,* See Chapter 6 above for detailed di cussion.

29 *Constitution of Jammu and Kashmir,* Section 147.

30 In *A.G. for New South Wales and others* v. *Trethowan* (1932 A.C. 526). The question to be decided was in substance whether the legislature of the State of New South Wales had the power to abolish the Legislative

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Constitution of the State by a duly convened constituent Assembly for the state. Therefore, in accordance with the popular desire of the people of the State, Cl. (7) of the Instrument of Accession; the proclamation of the Ruler dated March 5, 1948 and the proclamation of Yuvraj Karan Singh of June 1949 and Cl. (2) of Article 370 of the Constitution of India a stage was set for the covening of a Constituent Assembly for the State and accordingly on May 1, 1951, Yuvraj Karan Singh issued a Proclamation directing that a Constituent Assembly, consisting of representatives of the people elected on the basis of adult franchise be constituted forthwith for the purpose of framing a Constitution for the State of Jammu and Kashmir. The Proclamation also set out the manner in which the members of the State Constituent Assembly were to be elected. The preamble of the Proclamation which reads: ''Whereas it is the general desire of the people of the State of Jammu and Kashmir that a Constituent Assembly should be brought into being for the purpose of framing a Constitution for the State'' shows that Yuvraj Karan Singh was satisfied about the desirablity of convening a Constituent Assembly. In accordance with the Proclamation, a Constituent Assembly was convened on the basis of adult suffrage in September, 1951. The Constituent State of Jammu and Kashmir and the Constitution so framed was adopted on November 17, 1956. It came into force on 26th of January, 1957, after it was accepted by Yuvraj Karan Singh as per the stipulation contained in the Proclamation of the Ruler dated 5th March, 1949.

The events leading to the covening of the Constituent Assembly for the State of Jammu and Kashmir the application

Council of the State or to alter its constitution and powers, when Section 7 of the *Constitution (Legislative Council) Amendment Act, 1929* (New South Wales) provided that the Legislative Council could not be abolished, nor its constitution and powers altered except by a referencum. In 1930, the Government in power, wanted to getrid of this legislation. It enacted Bills with that object. The first Bill enacted that Section 7A was repealed and a second Bill enacted that the Legislative Council was abolished.

The Lord Chancellor (Lord Sankey) in the Privy Council, to whom the case went in Appeal, upheld the decision of the lower court and held that the Bills were invalid unless and until a majority of the electors voting had approved them. The appeal was dismissed.

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of Article 370 of the Constitution of India to the State and the enactment of the Constitution of Jammu and Kashmir, 1957, by the Constituent Assembly of the State as noticed above, unmistakably show that the Constitution of Jammu and Kashmir was enacted by a sovereign Constituent Assembly duly convened by the Ruler, who was competent in law to convene such an Assembly by virtue of the provisions of the Proclamation of the Ruler dated March, 5, 1948, the Proclamation dated May 1, 1951 and Article 370 of the Constitution of India."

"By the application of Art. 370 and certain other provisions of the Constitution of India to the State of Jammu and Kashmir, the plenary, legislative and executive powers of the Ruler in regard to the State of Jammu and Kashmir were not to be effected. The conclusion is, therefore, irresistible that the Constituent Assembly of the State has been validly constituted in exercise of the plenary powers of the Ruler and the Constitution which came into force in 1957 is a Constitution framed by a duly elected Constituent Assembly and is not a piece of ordinary legislation, let alone a subordinate legislation.[30a]

The State Territory

Section 4 of the Constitution of Jammu and Kashmir defines the territory of the State as:

> "The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State."

The extent of the territory has not been given in the Constitution. This has not defined in the Constitution of India either. The First Schedule to the Constitution of India[31] defines the territory of Jammu and Kashmir as:

> "The territory which immediately before the commencement of the Constitution was comprised in the Indian State if Jammu and Kashmir."

Prior to the accession of the State to India and after the partition of British India into India and Pakistan on the 15th of August, 1947, some parts of the state fell into the hands of the invaders, but the Instrument of Accession of Jammu and Kashmir State applied to the whole area of the State, including

30a *Dr. S.N. Dhar* v J & K State 1987 JKLR 109.

31 Vide Entry 15. Substituted by the *Constitution (Seventh Amendment) Act, 1956*, Section 2.

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the area now under enemy occupation. Observes Ferguson, "it was the whole State of Jammu and Kashmir that acceded to India, and although some regions had broken away, they had done so illegally, and their illegal action could not confer any right on Pakistan..."[32] or on anybody else for that matter.[33] The area of Azad Kashmir is *de jure* a part of the territory of the State of Jammu and Kashmir. The Constituent Assembly of Jammu and Kashmir State visualised the possibility of that area being vacated by the aggressor and in anticipation of that, it provided in the Constitution of Kashmir that "twenty-five seats in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly",[34] till the area of the State under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives.[35]

In all the last General Elections in the State, only seventy-five seats were contested, although the total strength of the Assembly is 111.[36]

State Flag

At the Delhi Agreement of 1952, a compromise was arrived at between the representatives of Jammu and Kashmir and India to the effect that the State was allowed to retain its own flag.[37] In the Parliament of India when this question of a separate flag for Kashmir was discussed there was a strong opposition.

32 Ferguson, James P., *Kashmir: an historical introduction*, London, 1961, p. 91.

33 It was to secure the withdrawal of the invaders from this part of the territory that India first complained to the Security Council in 1948. See also Chapter 4 above.

34 *Constitution of Jammu and Kashmir*, Section 48(a).

35 *Ibid.*, Section 48.

36 *Ibid.*, Section 47(1). Words 'one hundred and eleven' substituted for the words 'one hundred' by the Constitution of Jammu and Kashmir (Twentieth Amedment) Act, 1987.

37 See Chapter 5 also. The State flag was not the *Old Flag* of Maharaja Sir Hari Singh, but the flag of the National Conference, which the State was allowed to keep with the modification that in addition to the plough, it is to have three vertical stripes, representing Jammu, Kashmir and Ladakh.

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But ultimately, this concession to Kashmir was allowed on 'sentimental grounds'[38] and the State was allowed to have its flag in addition to the Union Flag. It was recognised that the State flag was not to be a rival of the Union Flag, which was to be supreme, as the State owed allegiance to and was part of the Union of India.

Section 144 of the Constitution of Kashmir provides for a flag for the State. It gives details about the flag and provides that the State Flag "shall be rectangular in shape and red in colour with three equidistant white vertical stripes of equal width next to the staff and a white plough in the middle with a handle facing the stripes". The three stripes represent Jammu, Kashmir and Ladakh. The ratio of the length of the flag to its width shall be 3 : 2.

Official Language of the State

The official language of the State, according to Section 145, is Urdu,[39] but the English language shall be used for "all official purposes of the State for which it was being used prior to the commencement of the Constitution".

According to the Constitution of Kashmir,[40] the six regional languages, will be: *Kashmiri*; *Dogri*; *Balti* (*Pali*); *Dardi*; *Punjabi*; *Pahari*; *Ladakhi*. But only the *Kashmiri* language has been recognised as a regional language in the Constitution of India.[41]

(2) PERMANENT RESIDENTS

'India' as defined by the Interpretation Act[42] and the Indian

38 *Parliamentary Debates* (*House of People*), 1952, Part II, Vol. IV, No. 8, Col. 5775-5922.

39 The Official Language of the Union of India is Hindi, in Devanagri script (Article 343). It applies to the State of Jammu and Kashmir only in so far as that relates to the official language of the Union, the language of the Supreme Court or for communication between two States.

40 *Constitution of Jammu and Kashmir*, Sixth Schedule.

41 *Constitution of India*, Eighth Schedule.

42 52 and 53 Vict., C. 63, Section 18.

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General Clauses Act[43] included not only the territories under the direct sovereignty of the Crown but also the territories of the Native States.

Section 311(1) of the Government of India Act, 1935[44] defined 'India' "as British India together with all territories of any Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler...".

"British India" in the same Act was defined as all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces.

Before the Indian Independence Act, 1947, the (British) Indian Government directly administered "British India" but the Indian States were independent States, subject however, to the 'paramountcy' of the British Crown. These States were ruled and governed by the Native Princes who were British protected allies.[45] Such States were over six hundred in number and every State had a different Ruler. But all the States were alike in that they were subject to the paramountcy of the British Crown; they were neither a part of nor governed by the laws of British India. The subjects and Rulers of these States were "not British subjects",[46] but since Foreign Affairs were controlled by the (British) Government of India on behalf of these States therefore, *vis a vis* foreign states, State Subjects were in the position of British Subjects.[47] According to the Statute of 1876, "the several Princes and States in India in alliance with Her Majesty have no connexions, engagements or communication with foreign powers and the subjects of such Princes and States are, when residing or being in places hereinafter referred to, entitled to the protection of the British Government and receive such protection equally with the subjects of Her Majesty" but in 'India' they were not British Subjects but citizens of their States

43 Act X of 1897, Section 3(27).
44 26 Geo. 5. Ch. 2.
45 Lee-Warner, Sir William, *The Native States of India*, pp. 255-72.
46 Bose, S.M., *The Working Constitution of India*, 1939, p. 230.
47 Gledhill, Alan, *Constitution of India*, p. 37.

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known as State Subjects; thus they were "British protected subjects".[48]

The citizenship of British India and the Citizenship of the Indian States remained in operation in 'India' till the partition of British India in 1947.[49] A person could acquire the citizenship either of British India or of an Indian State. He could not have both types for the purposes of matters in India. Thus, if a person had State citizenship, he was an alien in British India and *vice versa*. A 'State-subject' was an alien in other Native States as well. The States had their own laws of citizenship. In so far as foreign countries were concerned, as we have explained above, they were British Indian Citizens, but that did not mean that they had renounced their State citizenship.

In 1947, Dominion status was conferred on India and Pakistan. At the same time paramountcy lapsed and the States became independent. Under the provisions of Government of India Act, 1935, most of the States acceded to one or other Dominion by executing an Instrument of Accession. The result of the Indian Independence Act, 1947[50] was "that persons belonging to the States ceased to be British protected persons in the sense of *proteges* of the United Kingdom".[51]

The Indian Independence Act did not contain any provision with regard to the status of the inhabitants of the acceding States. In spite of the fact that in practice, before 1937, the Crown's paramountcy over the States was invariably exercised through the Government of India, the powers and prerogatives which paramountcy implied were not functions of the Government of (British) India. After the passing of the Act, 1935, paramountcy was exercised by the Crown Representative, an office distinct from Governor-General, though occupied by the same individual.

No Instrument of Accession contained any provision re-

48 Parry, Clive, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, London, 1957, p. 841.

49 10 and 11 Geo. 6. Ch. 30.

50 10 and 11 Geo. 6. Ch. 30.

51 Parry, Clive, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, p. 843.

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garding the status of the inhabitants of the acceding State. In fact, by virtue of the Instrument of Accession power over only three matters were surrendered, i.e. Defence, Foreign Affairs and Communications. In all other matters the sovereignty of the Ruler was to continue. By Clause 7 of the Instrument the sovereignty of the Ruler for internal matters of the States was protected and he was under no obligation to accept the Constitution of the Dominion to which he acceded. The Supreme Court has held that even on change of sovereignty over an inhabited area, the pre existing laws continue to be in force until duly altered.[52] The decision in *Sayce* v. *Ameer*[53] makes it further clear that the effect of the Instrument of Accession was not to make any state a part of the dominion of the Crown nor its inhabitants British subjects. Thus, the Instrument of Accession did not produce any material change in so far as the status of the princely states was concerned. The subjects of these States retained the citizenship of the States, notwithstanding the accession of their States to India and Pakistan. In actual effect and for all practical purposes the position of the Dominion Government *vis a vis* the acceded States was the same as that of the British Crown before 1947.

In India the accession of the States was followed by the merger of most of the States into the Indian Union towards the end of 1949, when the Constitution of India was framed. Many States were integrated into Indian provinces, losing their identity. Some merged into Unions and some remained intact. States of the last two categories became as Part B States units of India, their Constitutions being defined in the Constitution of India. The States agreed that there should be only one citizenship for the whole of India and accordingly when the States merged, their inhabitants became Indian Citizens and lost their State citizenship as from 26-1-1950 (the date when the Constitution of India came into force).

The State of Jammu and Kashmir did not merge in the Indian

52 *Shiva Bahadur* v. *State of U.P.* (1953) S.C.J. 563.

53 *Sayce* v. *Ameer Ruler Sadiq Mohammad Abbari Bhawalpur.* (1952) 1 All E.R. 326, 328-29).

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Union and it reserved the right to frame its own Constitution. We have seen in Chapters 5 and 6 that special provisions were made in the Constitution of India to cover the case of Kashmir. The State did not accept the citizenship laws of India and the status of its inhabitants did not change.

We have already seen[54] that in the late twenties, the people of Jammu and Kashmir State had agitated for the protection of their rights against the superior competing interests of the non-residents of the State. It was in response to this popular agitation that the Maharaja's Government promulgated a Notification in 1927[55] and provided a strict definition of the term "State Subject". This Notification read with the State Notification of 1932[56] provided to some extent the law of the Citizenship of the State. The comment of Parry that, "there does not seem to have been any written law of State nationality,"[56a] does not hold good in so far as the State of Jammu and Kashmir was concerned.

In 1950, the Constitution of India came into force. Article 370 of the same covered the case of Kashmir. By virtue of the powers conferred by this Article, the President of India, in concurrence of the Government of Jammu and Kashmir, issued an Order, *The Constitution (Application to Jammu and Kashmir) Order, 1950*[57] on January 26, 1950. This Order enumerated the provisions of the Constitution of India which were to apply to the State in addition to the provisions of Article 370 and Article 1.

Part II of the Constitution of India dealing with Citizenship was *not* made applicable to Jammu and Kashmir State. Even Entry 17 of the Union List,[58] which empowers the Union Parliament to make laws for the State on matters of '*Citizenship naturalisation and aliens*,' was modified to read only '*naturalisation and aliens*' in its application to Jammu and Kashmir State. The Union Parliament had no power to make laws for the State on citizen-

54 Chapter 3 above.
55 Notification No. I-L/84, dated 20th April, 1927.
56 State Notification No. 13/L, dated 27th June, 1932.
56a Parry, Clive, *op. cit.*, p. 842.
57 *C.O.* 10 of 1950.
58 *Constitution of India*, List I, Seventh Schedule.

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ship; the omission of '*citizenship*' from this entry in its application to Jammu and Kashmir, in fact, meant that in the State the old State Citizenship law prevailed. Thus, the people of Jammu and Kashmir State were 'protected subjects' in the rest of India and not 'Indian Citizens,' even after India became a Republic in 1950. There were historical and political reasons which necessitated such constitutional safeguards. Firstly, the Government of India did not want to exercise too much authority over Kashmir since it had committed itself to giving an opportunity to the people of Kashmir to finalise their future affiliations. Secondly, the popular ministry in Kashmir, when it came to power in 1948, had assured the people of the State that their rights as subjects of Kashmir would be protected. This necessarily meant that the law of the State dealing with State subjects should not be interfered with.

In 1952, when the Delhi Agreement was reached between the representatives of the Kashmir Government and the Government of India, it was agreed that, though the rights of the permanent residents of Kashmir had to be protected, there was no reason why the people of the State should be denied Indian Citizenship. The Government of India agreed that special provisions could be made in the law governing citizenship to provide for the return of those permanent residents of the State who went to Pakistan in anticipation or in consequence of the disturbances of 1947 and also for those who had left for Pakistan earlier but could not return. The Indian Government also accepted the view that the State Legislature could be given powers to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to acquisition of immovable property, appointments to service in the State and like matters. However, no definite decision was taken in 1952 and, pending the working out of the details, the old citizenship law of the State was to continue.[59]

In 1954, the Constituent Assembly of Jammu and Kashmir

59 Government of Jammu and Kashmir, *Kashmir and India: Constitutional aspect*, p. 17.

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ratified the State's accession to India and set the controversy regarding the future affiliations of the State at rest.[60] As this issue was now settled for the Kashmiris, it was deemed essential that the separate citizenship of the State be abolished, since the Constitution of India provides for only one type of citizenship for the whole of India. Discussions were held between the representatives of India and Kashmir and a compromise was reached. The Government of India agreed that the permanent residents of the State could have special rights but they were to have the common India citizenship. This was welcomed in the State[61] and, to avoid any misunderstanding, it was agreed that the term 'State Subjects' be deleted and in its place permanent residents' be substituted for such persons who were "State Subjects" under the provisions of the State Subject Notification of 1927.

The President of India, in consultation with the State Government, issued the Constitution (Application to Jammu and Kashmir) Order, 1954 on May 14, 1954.[62] The Constitution (Application to Jammu & Kashmir) Order expressly lays down that it shall come into force on the 14th day of May, 1954. From this it is evident that all those Articles including Art. 133, which have been made applicable to the State of Jammu & Kashmir, shall apply immediately from the date of its promulgation i.e. 14th May, 1959. The language of the President's Order is unequivocal and there is no reason to import words in it which would suggest that the articles of the Constitution relating to appeals shall be kept in abeyance. Accordingly, Article 133 would apply to all decress, judgments, orders and sentences of the High Court of Jammu & Kashmir which have been passed after the promulgation of the Constitution (Application to Jammu & Kashmir) Order, 1954.[62a] By Section 2(3) of the Order, Part II of the Constitution of India was made applicable to the State. This part of the Indian Constitution deals with Citizenship. By Section 2(3)(a) of the same Order the people of Jammu and Kashmir State were to be regarded as citizens of India from the date of commencement of the Constitution. However, since Part III of the Constitution of India

60 The people of the State have ratified the accession, which was already complete in law and in fact, to avoid any uncertainty about the future of the State.

61 See '*Khidmat*' Daily, Srinagar, April 17, 1954.

62 *C.O. 48*, See also Chapter 6 above.

62a *The Hindustan Forest Co.* v. *L. Lal Chand* 13 JKLR 1.

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dealing with the fundamental rights of Indian Citizens was applied to the State from 14th May, 1954, the retrospective recognition of State Subjects as citizens of India was in Kashmir of no practical value so far as the rights of the subjects were concerned.

In accordance with the agreement between the representatives of India and Pakistan, that the State Legislature would have the power to make special provisions for the 'permanent residents,' it was deemed necessary that some provision be made in the Constitution to cover that case. Accordingly, Article 35-A was inserted by Section 2(4)(j) of the Order, 1954. It reads:

"35-A *Saving of laws with respect to permanent residents and their rights*: Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir and no law hereafter enacted by the legislature of the State—

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir, or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions, as respects—

(i) employment under the Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be invalid on the grounds that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part."

The term 'permanent resident' has not been defined in the Order. 'Permanent residents' are such persons as are declared to be so by any existing law of the State or by any future law enacted by the State Legislature. And any such law may either confer special rights and privileges or impose restrictions upon the 'permanent residents' with respect to any or all the matters enumerated in sub-section (b) above. Such legislation shall be valid, notwithstanding that it is inconsistent with the fundamental rights guaranteed by the Constitution of India, to the citizens of India, such as discrimination on grounds of place of

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birth,[63] equality of opportunity for employment,[64] the right to acquire, hold and dispose of property,[65] and the right to reside and settle in any part of the territory of India.[66] This special treatment for Kashmiris seems to be a violation of the generally accepted principle of 'equality before law,' as permanent residents of Kashmir and citizens of India in the same sense as any person belonging to any other State of India. But academic appraisal of the situation would be misleading. The special treatment has been accorded to the 'permanent residents' to safeguard them from exploitation from outside. As compared with other parts of India, Kashmir is backward in the educational and economical fields; Kashmiris have long been exploited by their well-to-do neighbours.[67] It was necessary to make special provisions to enable them to develop so that they could deal with other Indian citizens on equal terms. The Kashmir Legislature made provisions regarding the 'permanent residents' by inserting Section 5A to 5F in the Constitution Act, 1939,[68] in 1954.

"5-A. Every person who is or is deemed to be a citizen of India under the provisions of part II of the Constitution of India as applied to the State of Jammu and Kashmir under the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be a permanent resident of the State of Jammu and Kashmir if at the date of commencement of the Jammu and Kashmir Constitution (Amendment) Act, 2011 namely the 14th May, 1954:

(a) he was a State Subject of class I or class II as defined in the State Subject Notification No. I-L 84, dated twentieth April, 1927 read with Notification No. 13/L, dated twenty-seventh June, 1932, or

63 *Constitution of India*, Article 15 (1).
64 *Ibid*, Article 16 (1).
65 *Ibid.*, Article 19(1) (f).
66 *Ibid.*, Article 19(1) (e).
67 See Chapter 3 for detailed discussion of the necessity of giving special treatment to the subjects of Kashmir.
68 Act XIV of 1996 (1939 A.D.).

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(b) after having acquired immovable property in the Jammu and Kashmir State in pursuance of an *Ijazatnama* granted under the *Ijazatnama* Rules for the time being in force, he has been ordinarily resident in the territory of the State for not less than ten years prior to the date of such commencement.

Explanation: All persons who before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954 were State Subjects of Class I or Class II as defined in the State Subject Notification No. I-L/84, dated 20th April, 1927 read with State Subject Notification No. 13/L, dated 27th June, 1932, and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, return to the State under a permit for resettlement in the State, or permanent return issued by or under the authority of any law made by the State legislature shall continue to be deemed permanent residents of the State.

5-B. Notwithstanding anything contained in the foregoing provisions of this Act every company, which immediately before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, was recognised to be a State Subject within the meaning of State Subject Notification No. I-L/84, dated 20th April, 1927 shall be deemed to be permanent resident at such commencement.

Explanation: In this section 'Company' shall have meaning assigned to it in the Jammu and Kashmir Companies Act, 1927.

5-C. Every person who is or deemed to be a permanent resident of the State of Jammu and Kashmir shall, subject to the provisions of any law that may be made by the State Legislature, continue to be such permanent resident.

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5-D. The power of the State Legislature to define the term "permanent resident of the State" and to regulate their special rights and privileges shall be exercisable only by a majority of not less than two thirds of the total membership of the Legislative Assembly.

5-E. Nothing contained in the foregoing provisions shall derogate from the power of the State Legislature to make laws as it thinks fit with respect to the acquisition of the status of the permanent residents and until the State Legislature enacts provisions in that behalf the existing *Ijazatnama* Rules shall continue to remain in force and the existing procedure for obtaining a State Subject Certificate shall be followed for the purposes of securing a certificate of being a permanent resident of the State.

5-F. Unless the context otherwise requires all references to the expression 'State Subject' shall be construed as references to the permanent residents of the State."[69]

These regulations were to remain in force till the State Legislature repealed, altered or amended them. These remained in force till the coming into force of the Constitution of Jammu and Kashmir in 1957. It came into force on the 26th January, 1957. Part III of the Constitution deals with the permanent residents.

By and large the provisions of this part are the same as the provisions of Section 5A to 5F, referred above. The general effect of these provisions is that the separate citizenship of the State has been abolished and the laws of Indian citizenship extend to the State.[70] The Legislature can, however, confer special rights and privileges on permanent residents of the State. Another class of persons whose interests had to be safeguarded were those who had left the State on account of the disturban-

69 *Jammu and Kashmir Constitution (Amendment) Act*, 2011 (1954 A.D.).

70 *The Indian Citizenship Act, 1955* (Act 57 of 1955), extends to the State of Jammu and Kashmir also.

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ces of 1927. If they returned to the State under a permit for resettlement or under a permanent return issued under the authority of the State legislature for the purposes of permanently residing in the State, then they were to be entitled to the rights, privileges and obligations of citizenship.

Article 7 of the Constitution of India deals with the rights of citizenship of certain migrants to Pakistan who returned to India under a valid permit for resettlement or permanent return issued by or under the authority of any law in force at that time. All such persons if they had migrated before the 19th day of July, 1948, and had resided in the territory of India since that day or if they had migrated after the 19th of July, 1948 and were registered as citizens of India by an officer duly appointed for that purpose were entitled to the rights of citizenship of India.[70a] In the later case there was a special provision applicable to persons who came to India after the 19th July, 1948. They could only apply for registration as citizens of India after residing in the territory of India for at least six months after their migration to India and preceding the date of their application.[71] In the case of Jammu and Kashmir, however, there is a proviso:

> "Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir, who, after having so migrated to the territory now included in Pakistan, returns to the territory of that State under a permit for resettlement in that State of permanent return issued by or under the authority of any law made by the legislature of that State, and every such person shall be deemed to be a citizen of India."[72]

This proviso makes it easier for 'permanent residents' of the State who want to return to the State to do so. Such migrants

70a "Persons who migrated to Pakistan after the first day of March, 1947, can only acquire Indian citizenship if they return to India under a resettlement permit." See Art. 7, Constitution of India; see also Gledhill, Alan, *Constitution of India*, p. 166.

71 *Constitution of India*, Article 6(b).

72 *Ibid.*, Proviso to Article 7.

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will be regarded as citizens of India, notwithstanding the fact that they did not register (if they migrated after 19th July, 1948) as desired by the laws in force in India at that time.[73] This proviso, in fact, exempts 'permanent residents' of the State from the formalities of Article 6 of the Constitution of India. It facilitates the return of the permanent residents to the State.

The Influx from Pakistan (Control) Act, 1949[74] provided that no person (subject to some exceptions) should enter India from any place in Pakistan whether directly or indirectly unless in possession of a permit. This Act was repealed in 1952[75] and now the *Indian Passport Act, 1920*[76] governs the influx from Pakistan as also from other countries. However, according to Section 4(1)(e) of the Passport Rules of 1950,[77] "persons domiciled in Pakistan who are in possession of immigration Certificates duly issued by an Indian diplomatic mission in Pakistan" shall be exempted from the obligation to be in possession of a passport. Thus the requirement of a passport has been eliminated for a person who returned to India from Pakistan under an immigration certificate. The provision extends to the whole of India including the State of Jammu and Kashmir.

Consequently 'permanent residents' of the State who return will need neither a passport nor an immigration certificate. They will not even have to register themselves after they come back to India. All that the law requires of them is that they should be in possession of a valid permit for resettlement or permanent return issued by or under the authority of any law of the State Legislature In this respect, it will be observed that State Legislature acts as a delegate of the Union Parliament.

The special rights and privileges of permanent residents of the State are not static. The need may arise at any time to

73 *Constitution of India*, Article 6(b) (i & ii).
74 Act XXIII of 1949.
75 By Act LXXVI of 1952.
76 Act 34 of 1920.
77 *Indian Passport Rules*, 1950 (Ministry of Home Affairs Notification No. 4/5/49-F.I, dated the 25th April, 1950). Published in *Central Acts and Rules relating to Foreigners* (as amended upto 15-5-1960).

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liberalize them. The importance of the fact that the Constitution of Jammu and Kashmir enables[78] the State Legislature to define and amend such rights and privileges becomes obvious in the context.

The Constitution of Jammu and Kashmir, apart from the special rights and privileges of the permanent residents of the State, does not contain any declaration of fundamental rights, but by reference applies with variations the fundamental rights under the Constitution of India. Section 10 of the Constitution of Jammu and Kashmir provides that permanent residents of the State will have all the rights guaranteed to them under the Constitution of India as applicable in the State under the Constitution (Application to Jammu and Kashmir) Order, 1954, vide Section 2 (4).

Article 370 has never ceased to be operative and the validity of the Constitution (Application to J & K) Order, 1954 as well as other orders made thereunder by the President have been upheld by the High Court.[78a]

Thus, we find from the above discussion that Part III of the Constitution of Jammu and Kashmir, apart from abolishing the separate citizenship of the state, has secured to the permanent residents of the State their individual character only in so far as that is consistent with their common Indian nationality, which they have secured by virtue of Article 5 of the Constitution of India. Parliament's power to regulate the rights of citizenship by law under Article 11 of the Constitution of India extends to the State of Jammu and Kashmir subject, of course, to the provisions of the Constitution of Jammu and Kashmir. No longer have the residents of Jammu and Kashmir a separate citizenship as distinct from Indian Citizenship.

(3) DIRECTIVE PRINCIPLES OF STATE POLICY

The preamble to the Constitution of Jammu and Kashmir declares the resolve of the people of Jammu and Kashmir State to secure to themselves, social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of the individual and unity of the nation. These aims have been vividly expanded in Part IV of the Constitution of Jammu and

78 *Constitution of Jammu and Kashmir,* Sections 8 & 9.

78a *Sampat Prakash* v. *State of J & K* 1971 JKLR 83.

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Kashmir which contains the Directive Principles of State policy.[79] These principles have been declared to be fundamental in the governance of the State but they are not enforceable by any court of law, which means that no court can declare any legislation invalid on the ground that it does not conform to any of the declared Directive Principles.[80] However, the restrictions which are imposed on the exercise of the Fundamental Rights for the purposes of securing the objectives enjoined by any of the Directive Principles would be regarded as a "reasonable restriction".[81] In interpreting the Fundamental Rights, "the courts will be obliged to lay down canons for determining what is reasonable and it is improbable that restrictions should be deemed reasonable if it offends against the Directive Principles".[82] As such, though not strictly enforceable by courts, they are bound to effect the decision of the courts on Constitutional questions.

The Directives lay down that the prime object of the State shall be the promotion of the welfare of the mass of the people by 'establishing and preserving a socialist order of society'. It is envisaged that 'exploitation of man' would be abolished and the means of production where they are privately owned would not be allowed to be used to the common detriment.[83] This objective is in complete accord with the ideals of the State freedom movement as outlined in the programme of *New Kashmir*.

It is also in consonance with the general trend of political and economic development in India. But Kashmir is moving faster than the rest of India. The way in which the policy of the 'Land to the tiller'[84] without any compensation for the expropriation, has been carried out, has proved that the popular ministry in Kashmir will try its best to establish a socialist

79 *Constitution of Jammu and Kashmir*, Sections 11-25.
80 *Ibid.*, Section 12.
81 *State of Bombay* v. *Balsara* (1 51. S.C.R. 682).
82 Gledhill, Alan, *Constitution of India*, p. 162.
83 *Constitution of Jammu and Kashmir*, Section 13.
84 Act XVII of s. 2007 (1950 A.D.). The subsequent legislation, namely, The Agrarian Reforms Act, 1978, however, provides for compensation at the prescribed scales to the owners whose lands escheat to the State.

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order and that section in the Constitution will not be a dead letter. The public sector, in which the means of production are owned by the State, is becoming wider and wider, while the operation of the private sector is being scrutinised and restricted to prevent concentration or unfair distribution of wealth.

The Constitution, "within the limits of its economic capacity and development"[85] guarantees work with payment for labour "subject to a basic minimum and maximum wage established by law".[86] Even though it is a revolutionary process, yet it is bound to be slow. The social, economic and political fabric of the State does not warrant such a revolutionary change with the mere stroke of a pen.[87] A policy of peaceful transformation, stage by stage, to a socialist state which would abolish the exploitation of man by man is being pursued in Kashmir. The leadership in economic activities rests with the State. Tourism and handicrafts are the most important factors in the common man's life. Means of communication are receiving priority in Government ventures; the *Jawahar Tunnel*[88] is an outstanding example. Emporia are established in important centres of India to organise the sale of products of Kashmir handicrafts, raising

85 *Constitution of Jammu and Kashmir*, Section 19.

86 *Ibid.*, Section 19(a).

87 Leaving aside the states with socialist idiologies, even the communist states are hesitant to adopt such drastic changes. *China* provides an example. It "did not follow the footsteps of Russia and it has not squeezed out capitalist industry and commerce though the people's revolution had become victorious as early as 1949. Only the property of the bureaucrat capitalists who were the chief supporters of imperialism and who had established monopolies, was seized outright and was made the foundation of State owned sector of China's economy. Those capitalists who helped in the expansion of production and were sympathetic towards national aspiration were not touched". ('*Daur-i-jadid* Weekly', New Delhi, 26-1-1957).

88 *Jawahar Tunnel* was built in 1958. It has cut out 18 difficult miles between Jammu and Srinagar. It has established a lasting link between the valley of Kashmir and the rest of the country and the bottleneck in communication caused by the suspension in winter months of the traffic through the old tunnel removed.

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the standard of life of the common man by increasing the scope of his employment.

Perhaps one of the biggest achievements of the Government is that the State today enjoys the benefit of free education from the primary stage to the University level. This policy is in furtherance of the Directive which declares that the State shall endeavour to "secure to every permanent resident" of the State "the right to free education" and to "provide within a period of ten years from the commencement of the Constitution, compulsory education for all children until they complete the age of fourteen years".[89] From this it follows that firstly the right to free education is limited to only the 'permanent residents' of the State, which means that students from other parts of India cannot share this privilege; if admitted to educational institutions in the State, they may be required to pay the fees prescribed. Secondly, free education will be provided only in schools maintained by Government, which means that the right of the *private* schools to charge fees cannot be challenged, for the charging of fees is protected by the right to carry on an occupation.[90] Thirdly, the present provisions does not confer any legally enforceable right upon schools to receive grants-in-aid from the Government.[91]

That steps have already been taken to implement the principle of mass education are evident from the fact that the number of colleges had risen from 3 in 1947 to 26 in 1959.[92] The number of primary schools had risen from 1081 to 1771, middle schools from 73 to 219 and High schools from 19 to 121.[93] The University, established in 1949, has extended the scope of postgraduate studies from one to six subjects; facilities are now available in *Geology*, *English*, *Hindi*, *Urdu*, *Mathematics* and

89 *Constitution of Jammu and Kashmir*, Section 20.
90 *Constitution of India*, Article 19(1) (g).
91 *Joseph* v. *State of Kerala* [A.I.R. (1958) Kerala 290].
92 *Kashmir Information Series* (*Education*), p. 11.
93 *Ibid.*, in 1960-61, 23,000 children were enrolled in primary classes and 630 new primary schools were opened. 1,100 new teachers were appointed. (*India News*, High Commission of India, London) Vol. 15, No. 8, dated Feb. 24, 1962.

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Economics.[94] An up-to-date Library has been built in Srinagar on a plot of land presented by the Sadar-i-Riyasat, who, besides being a scholar, is also the Chancellor of University. Eminent persons have served the University as its Vice-Chancellors. A basic training school, a polytechnic, two teacher training colleges, an agricultural training college, an Ayurvedic College, an Engineering College[95] and two Medical Colleges have already been established in the State, one each in Srinagar and Jammu.

The vast majority of the people of the State live in villages and the Constitution provides for the State's guidance a principle to ensure the speedy improvement of the living conditions of rural masses and to develop agriculture and animal husbandry for their benefit.[96] But unlike India,[97] the Constitution does not specifically prohibit the slaughter of cows although in practice and under the Penal Law it is banned. The slaughter of cows is banned by law and there is severe punishment in case of disobedience.[98]

To the socially and educationally backward classes, the Constitution guarantees the promotion of their educational, material and cultural interests and their protection against social injustice.[99]

The Directive Principles also lay down that the State shall make every effort to safeguard and promote the health of the people by advancing public hygiene and prevention of disease through sanitation, pest and vermin control, propaganda and other measures.[100] The State aims at providing free and efficient service in the field of medicine throughout the State.[101]

The Constitution does not ignore the rights of the women either. It puts a moral obligation on the State to provide for

94 At present there are two separate universities for Jammu and Kashmir.
95 Engineering College was started as an All India Institute in June, 1960.
96 *Constitution of Jammu and Kashmir*, Section 15.
97 *Constitution of India*, Article 48.
98 See Chapter 3 ante.
99 *Constitution of Jammu and Kashmir*, Section 23.
100 *Constitution of Jammu and Kashmir*, Section 24.
101 *Ibid.*, Section 22.

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all women their right to equal pay for equal work, besides maternity benefits and medical care. It makes special provisions for abandoned and divorced women and ensures them reasonable maintenance. It protects them from discourtesy, defamation and hooliganism. The Constitution guarantees women equality in all social, political, educational and legal matters.[102] The Constitution empowers the Governor to nominate two women members to the Legislative Assembly, if he finds that their representation is not adequate.[103] Discrimination on grounds of sex in electoral matters is also prohibited.[104]

All modern Constitutional States apply, as far as practicable, the principle of separation of judiciary from the executive. Section 18 of the Constitution of Jammu and Kashmir lays down a directive to that effect and attempts to separate the judiciary from the executive. To ensure the working of the above principle, judges of the High Court are assured security of tenure.[105] They are not removable under the stress of the vagaries of political changes. Their removal is very difficult.[106] They are appointed under the hand and seal of the President of India after consultations with the Chief Justice of India and the Governor and in the case of the appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. Normally, the judges remain in office until they attain the age of sixty-two years.[107] The legislature of the State has no say whatsoever in their appointment. Apart from separating judiciary from the executive, the state also aims at securing "speedy, cheap and objective justice".[108]

Keeping in line with the tradition of the Freedom Movement in Kashmir and the secular outlook of the Nationalist movement, the Constitution lays down that the 'State shall combat

102 *Constitution of Jammu and Kashmir*, Section 22.
103 *Ibid.*, Section 47.
104 *Ibid.*, Section 139.
105 *Ibid.*, Section 95.
106 *Ibid.*, Section 99(2).
107 Substituted for 60 years by (Sixth Amendment) Act, 1965.
108 *Ibid.*, Section 18. The legislature passed the separation of Judiciary and Executive Functions Act, thereby giving effect to the dictates of the constitution.

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'ignorance', 'superstition', 'fanaticism', 'communalism', 'racialism', 'cultural backwardness' and shall seek to foster "brotherhood and equality" among all sections under the aegis of a *secular state*.[109] As early as 1948, Sheikh Mohammed Abdullah, then Prime Minister of Kashmir, voiced the view of the people when he said that "there is no place in Kashmir for a theocratic state".[110] The present section, as such, represents the wishes of the people of the State.

Section 15 of the Constitution declares that the "State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government". This section is based on Article 40 of the Constitution of India and requires the State to organise village panchayats as units of self-government.

The State must also strive to secure a happy childhood with adequate medical facilities and opportunities in education and employment to the children of the State. Already numerous Kindergarten Schools have been established in the State. Youth hostels are also being built in places of great interest. One youth hostel has been started in *Srinagar* and another at *Pahalgam*.[111]

Further, the Governor has been empowered[112] to establish an Academy of Arts, Culture and Language, in order to enhance the appreciation of Art and Culture among the common people of the State.

The Directive Principles are in fact in the nature of instructions issued to the future legislatures and the executives for their guidance in framing and implementing the law; not only the State Government but also local authorities like panchayats and municipal corporations will be under a moral obligation to

109 *Constitution of Jammu and Kashmir*, Section 25.

110 Press Conference in New Delhi on September 29, 1948, produced in *'Daur-i-Jadid'*, p. 18.

111 A youth hostel at Patnitop and a sports stadium at Jammu with residential facilities have been set up.

112 *Constitution of Jammu and Kashmir,* Section 146. 'Governor' substituted for Sadar-i-Riyasat by the Jammu and Kashmir Constitution (Sixth Amendment) Act, 1965. *Vide* SRO 340, dated 14-8-1963, The Jammu and Kashmir Academy of Arts, Culture and Languages has been created.

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follow these instructions,[113] to enable the realisation of a socialistic order of society.

Thus, when the Constitution declares its aim to establish a socialist order for the society,[114] it speaks for the people of the State who have already had a foretaste of socialist tendency. They have already experienced the liquidation of 'big landed estates'. Therefore, it would be superficial to dismiss these precepts as good resolutions fit only for paving stones on the broad and primrose-strewn way".[115] Countless individuals have benefited by similar precepts in the course of history of the nations and as such it is to be hoped that these precepts will have a great influence in the shaping of the emerging State of Jammu and Kashmir and in leading the State to social harmony.

(4) ELECTION UNDER THE CONSTITUTION OF JAMMU AND KASHMIR

The people of the Jammu and Kashmir State had their first taste of Parliamentary elections in 1934, when, as a result of popular agitation, a franchise committee was set up in Kashmir which recommended a legislative Assembly for the State. On this recommendation, Maharaja Sir Hari Singh set up a legislative assembly, known as the *Praja Sabha*. Elections were held in early 1934 on a very limited basis.[116]

The Assembly was to consist of 75 members. Only 33 were to be elected by the different communities on a franchise which did not cover more than 3% of the population. Women were altogether excluded from voting, the excuse given in the words of the franchise commission being, "the inclusion of women voters would increase the administrative difficulties of the election".[117] However, what these difficulties would have been was never brought to light. Males entitled to vote were only such persons as had passed the Middle School Examination or its

113 *Constitution of Jammu and Kashmir*, Section 11.
114 *Ibid.*, Section 13
115 Gledhill, Alan, *Constitution of India*, p. 161.
116 See Chapter 3 ante.
117 Government of India, *Elections in Kashmir*, 1957, p. 2.

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equivalent.[118] Illiterates were not entitled to vote. The literate voters consisted mostly of lawyers, medical practitioners, pensioned officers, title holders, village and district headmen, priests and managers of religious property. No person who did not have a yearly income of Rs. 400/- or more could vote. As 42 members were nominated by the Maharaja, he was assured of a permanent majority in his favour.

By the proclamation of the Ruler of 11th February, 1939,[119] seven more seats were thrown open to election, thus, bringing the total number of elected members to forty. In reality, these seven seats only increased the representation of vested interests. Two members were to be elected by the *Tazimi Sardars* (Chief Landholders) numbering 27. Of the 175 *Jagirdars* in the State, two seats were filled by election from amongst them. Two more seats were elected by a constituency of 700 landholders who paid an annual land tax of Rs. 250/- or more and the remaining one seat was filled from a constituency of 700 pensioners.[120] Apart from the composition of the Assembly, the powers of the Praja Sabha were very limited.

These constitutional provisions were only intended to throw dust in the eyes of observers: by no means could they be regarded as intended to create a democratic system of Government.

The Maharaja's proclamation of 1948,[121] which set up a popular ministry in the State, assured the people of the State that the future elections in the State would be based on universal adult suffrage and when a mandate of the people became necessary on several important issues, the Yuvraj issued a proclamation[122] convening the Constituent Assembly for the State. The elections to the Assembly were held in August, 1951. The franchise was based on universal adult suffrage and the constituencies were so delimited as to give one member for every forty thousand

118 Government of India, *Elections in Kashmir*, 1957, p. 2.
119 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State*, 3rd edn., 1947, p. 35.
120 Government of India, *Elections in Kashmir*, p. 3.
121 *Constituent Assembly Debates (Legislative)*, 1948, Vol. III, p. 1656.
122 See Chapter 5.

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people.[123] When in 1957, the Constituent Assembly adopted the new constitution for the State, it remained in being as the provisional State Legislature, pending the holding of general elections.[124]

Adult suffrage is a distinguishing feature of the new constitution, which provides sufficient safeguards for the conduct of free and fair democratic elections to the legislature under the 'suprintendence, direction and control', of the election commissioner appointed by the Sadar-i-Riyasat (now Governor).[125] It has been held by the Allahabad High Court[126] that the words 'superintendence, direction and control' empower the Election Commissioner to decide whether a fresh poll should be held at a particular polling station.

The provisional legislature passed the People's Representation Act, 1957[127] on February 1, 1957. This Act provided for the 'delimitation of constituencies for the purpose of elections to the Legislative Assembly and the Legislative Council, qualification of voters at such elections, conduct of elections and matters connected therewith'. Section 3 of the Act empowers the Governor by order to determine "...the constituencies into which the State shall be divided", the "extent of each constituency" and the "number of seats allotted to each constituency".

123 Government of India, *Elections in Kashmir*, p. 5.

124 *Constitution of Jammu and Kashmir*, Section 148.

125 *Constitution of Jammu and Kashmir*, Section 138. The 'Superintendence, direction and control' of election to the Legislature of Jammu and Kashmir now vests in the Election Commissioner of India by an amendment to Section 138 of the Constitution, through Section 8 of the, *Constitution (First) Amendment Act, 1959* (Act XIX of 1959). The difference from the other Indian States, however, is that the exercise of jurisdiction by the Election Commission of India in this State would be under the laws of the State and *not* of the Union. This difference is in conformity with the unique position of Kashmir in the Indian Union, where the legislature has already framed laws for the conduct of elections in the State. The procedure for the Election of the President and Vice-President of India would however, be the same in the State as in the rest of India. (Art. 324).

126 *Motilal* v. *Mangla* [A.I.R. (1958), Allahbad 794 at p. 799].

127 Act 4 of 1957.

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The Governor may, from time to time, alter or amend any order made by him to delimit the Constituencies.[128] In the interest of the general public the Act provides that all such orders are "subject to such modifications as the legislature may make". This is a situation which could not be regarded with equanimity for the possibility of the majority party in the legislature "gerrymandering" the delimitation of the constituencies for its own advantage could not be ignored.[129] In the rest of India, under the 'Delimitation Commission Act, 1952',[130] a Commission is required to be constituted for readjusting the representation of the territorial constituencies of the House of the People and the Legislative Assemblies of the Indian States as well as the delimitation of the Constituencies. This effectively excludes interference by political parties for their own advantage, a determining factor in delimiting constituencies which has since 1966 been adopted in Kashmir also.

The power of the President of India[131] to determine the constituencies for elections to the legislative councils of the States is, in the case of Jammu and Kashmir, limited by Section 50 of the State Constitution, which deals with the composition of the Legislative Council in the State. Whereas in Kashmir the three Constituencies consist of local authorities, teachers and panchayats,[132] in States other than Kashmir, these consist of

128 Act 4 of 1957, Sections 4 & 5.

129 *Ibid.*, Section 7. See also Act IX of 1966. However, the provision has been substantially altered by Act XXVI of 1960; Act V of 1967 and Act XI of 1967. This original Section 7 has been omitted by Act IX of 1966.

130 Act 81 of 1952.

131 *Representation of the People's Act, 1950*, Act XLIII, Section 11. As soon as may be after the commencement of this Act, the President shall, by order, determine:

"(a) the constituencies into which each State having a Legislative Council shall be divided for the purpose of election to that Council under each of the sub-clauses (a), (b) and (c) of clause (3) of Article 171;

(b) the extent of each constituency; and

(c) the number of seats allotted to each constituency."

132 *Constitution of Jammu and Kashmir*, Section 50(4).

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state legislatures, local authorities, teachers and graduates. The members of panchayats in Kashmir are mostly nominees of the ruling party. The democratic principles might be better assured in Kashmir by substituting graduates for the panchayats. There might have been difficulties in creating a constituency for the graduates in the State in 1957 owing to the paucity of graduates, but the situation has since improved.[133] Clauses (c) and (d) of section 50 (4) have been omitted by the Constitution of Jammu and Kashmir (Fifth Amendment) Act, 1963.

The People's Representation Act, 1957[134] also lays down rules and regulations for the preparation and publication of electoral rolls and for the entertainment of objections and claims for inclusion in them. The Election Registrar, if he is satisfied, after proper enquiry, that the objection is valid, can amend the entry accordingly.[135]

The Act and Rules[136] passed thereunder lay down detailed provisions ensuring the strict secrecy of ballots. The Act is based on similar legislation applicable in the rest of India but the powers of the Election Commissioner are more limited than in the rest of India.

While the Chief Election Commissioner of India himself is appointed by the President of India under Article 324 of the Constitution of India, his appointment for the Jammu and Kashmir State must be made under Section 138 of the Constitution of Jammu and Kashmir [as amended by the *Constitution (First) Amendment Act, 1959*]. The provisions of Articles 325-34 and 342 of the India Constitution which deal with the Elections to the Parliament and the State Legislatures and reservation of seats for certain classes of persons and scheduled tribes are not applicable to the State. There being no Scheduled Tribes in the State, Article 342 of the Constitution of India is obviously inapplicable. While in many respects the laws and rules of the State of Jammu and Kashmir are modelled on the pattern

133 The number of students who graduated in 1960-61 was 691 and this number has been steadily rising ever since.

134 Act 4 of 1957.

135 *Ibid.*, Section 19(3).

136 *Representation of People (Conduct of Election and Election Petitions) Rules*, 1957.

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of Indian laws and rules, one of the most significant Articles of the Indian Constitution[137] that is not applied to the State relates to the power of the Union Parliament to make laws "relating to, or in connection with, election to either House of Parliament or to the House or either House of the Legislature of a State,' including the preparation of the electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses". This can possibly be explained by the fact that, by an agreement between the State Government and the Government of India in 1952,[138] entry 72 of the Union List, dealing with elections, is not made applicable to the State. Kashmir has been given a free hand to frame its own rules.

The rules governing elections to Parliament[139] also differed in the State from those applicable in the rest of India.[140] Instead of the representatives of the State being directly elected to the House of the People (Lok Sabha), the representatives for Kashmir are indirectly elected by the legislature of the State and appointed to Parliament by the President of India. Moreover, this indirect election was not by proportional representation. Kashmir has been allotted six seats in the Lok Sabha. Because of this indirect mode of elections, the opposition, even if united, could hardly hope to be represented.[141] However, the election of four

137 *Constitution of India*, Article 327.
138 See Chapter 5 ante.
139 *Constitution of India*, Article 81.
140 *C.O. 48*, Section 2(5) (c).
141 This indirect election has now subsequently been changed into direct election by C.O. of 1966. In Article 81 of the Constitution of India, for clauses (2) & (3) the following clauses have been substituted:

"(a) there shall be allotted to the State six seats in the House of the People;
(b) the State shall be divided into single-member territorial constituencies by the Delimitation Commission constituted under the Delimitation Commission Act, 1962, in accordance with such procedure as the Commission may deem fit;
(c) the constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to

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representatives[142] to the Council of States (Rajya Sabha) is based on the same procedure as is adopted in the other Indian States.[143]

Part X of the Constitution of Jammu and Kashmir deals with the elections in the State. The elections to the State Legislative Assembly are to be held on the basis of adult suffrage, which means that every person of [18][143a] years or over is entitled to vote. The right to vote, however, is limited to 'permanent residents' of the State.[144] No person is ineligible for inclusion on the electoral rolls on grounds of religion, race, sex, or caste.[145] Illiteracy or poverty is no longer a bar to the right to vote.

The People's Representation Act, 1957, bars the jurisdiction of the civil courts:

(a) to entertain or adjudicate upon any question, whether any person is or is not entitled to be registered in an electoral roll for a constituency, or

(b) to question the legality of any action taken by or under the authority of an electoral registrar or of any decision given by any authority appointed under this Act for the revision of any electoral rolls or any action taken or decision given by the returning officer or by any other person appointed under this Act in connection with an election.[146]

physical features, existing boundaries of administrative units, facilities of communication and public convenience;

(d) the Constituencies into which the State is divided shall not comprise the area under the occupation of Pakistan; and

(e) until the dissolution of the existing House of the People, the representatives of the State in that House shall be appointed by the President on the recommendation of the Legislature of the State."

142 See Schedule IV.

143 *Constitution of India*, Article 80(4).

143a Words 'eighteen years' substituted for the words 'twenty-one years' by The Constitution of Jammu and Kashmir (Twenty-First Amendment) Act, 1989.

144 *Constitution of Jammu and Kashmir*, Section 140.

145 *Ibid*, Section 139.

146 Section 169, *People's Representation Act*, 1957 (Act 4 of 1957).

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The Constitution of Kashmir bars the interference by courts in electoral matters[147] and this provision gives complete protection to the acceptance or rejection of the nomination papers by a returning officer from challenge in a court of law.[148] Though the term "election" refers to the 'entire process culminating in a candidate being declared elected,'[149] it does not go beyond the declaration of the candidate being elected, and does not include the decision of an Election Tribunal as to the validity of an election.[150] An election ends with the declaration of the results;[151] if subsequently an election tribunal is set up, the High Courts are not barred from interference with its decision.[152] However, since 1967, it is the High Court *alone* which has the power to try an election petition.[153]

But whereas in the rest of India, Election Tribunals like any other tribunal are under the "superintendence and control," of the High Courts, in Jammu and Kashmir State they are not. (Since, 1967, Election Tribunals no longer try election petitions in any part of the country.) Section 104 of the Constitution of Jammu and Kashmir which corresponds to Article 227 of the Constitution of India and of which it is an adaptation reads:

> "The High Court shall have superintendence and control over all courts for the time being subject to its appellate or revisional jurisdiction and all such courts shall be subordinate to the High Court."

Section 104 of the Jammu & Kashmir Constitution corresponds to Article 227 of the Constitution of India and confers on the High Court the power of superintendence and control over the subordinate courts and not original jurisdiction.[153a]

It is significant that the word 'Tribunal' is absent from Section 104 of the Constitution of Jammu and Kashmir; no 'Tribunal' in Jammu and Kashmir State is under the 'superintendence and

147 *Constitution of Jammu and Kashmir,* Section 142.
148 *Ponnuswami* v. *returning Officer* (1952) S.C.R. 218.
149 *ibid.*
150 *Rajkrushna* v. *Binod* (1954) S.C.A. 737.
151 *Nagappa* v. *Basappa* A.I.R. (1954) Mysore 102.
152 *Basappa* v. *Nagappa* (1954) S.C.A 620; A.I.R. (1954) S.C. 440.
153 Vide Act XI of 1967, Section 88-A was inserted in the J & K Representation of People Act, 1957 vesting the jurisdiction to try an election petition in the High Court. This brings the situation at par with that prevailing in the rest of the country.
153a *The J & K Cooperative Bank* v. *Shamasundar* 1971 JKLR 421.

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control' of the High Court; the High Court has no power to guide, advise or direct "Tribunals" in the execution of their duties.[154] The High Courts superintendence and control is limited to the *courts*. An election tribunal is not a court in the accepted sense of the word. Section 20 of the 'Ranbir Penal Code,' 1989,[155] defines the Court of Justice as:

> "The words "Court of Justice" denote a judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially."

An election tribunal has been held[156] to be a quasi-judicial body. The word "Tribunal" has not been defined in the Constitution and therefore it must have the same meaning as under Article 136 of the Constitution of India. Observes Basu,[157] "...'tribunal' does not mean 'court' but includes within its ambit all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions."

However, simply because the High Court has no 'superintendence and control' over the Tribunal, it cannot be said that the High Courts cannot interfere with the decision of an Election Tribunal.[158] A writ can be issued under Section 103 of the Constitution of Jammu and Kashmir against the decision of an election tribunal.[159] Moreover Section 123 of the *People's Representation Act, 1957* lays down that:

154 *Sant Lal* v. *Kedar* [A.I.R. (1935) All. 519].
155 Act XII of 1989 (1932 A.D.).
156 *Durgashanker* v. *Raghuraj* [A.I.R. (1954) S C. 520].
157 Basu, D.D., *Commentary on the Constitution of India*, p. 783.
158 *Basappa* v. *Nagappa* (1954 S.C.A. 620).
159 This problem, however, has since ceased because Section 88-A of the [Jammu and Kashmir Representation of People Act, 1957 as amended by Act IX of 1967, vests the power to try an election petition in the High Court and brings the position in the State at par with the position in the rest of the country in matters relating to

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"An appeal shall lie from every order made by a tribunal under Section 106 (Decision of the Tribunal on Election petitions) or under Section 107 (Other orders by the Tribunal) to the High Court."

The right of the Supreme Court, under Article 136 of the Constitution of India is also not affected.[160]

The limitation put by Section 142 only demands that an election may only be questioned by an election petition,[161] to be presented to such an authority and in such manner as may be prescribed by law.

By the Representation of People (Conduct of Elections and Election Petitions) Rules, 1957, an election petition must be presented to a single member Election Tribunal appointed by the Sadar-i-Riyasat (later on the Governor) from amongst a list of persons who are in the opinion of the High Court fit to be appointed as members of the tribunal. Only such persons as have been advocates of the High Court for at least seven years or have been district judges for at least seven years can be appointed Members. The Sadar-i-Riyasat (later the Governor) may, however, appoint a person qualified to be a judge of the High Court as a member, even if he was not included in the list submitted by the High Court.[162]

By the amendment of the Constitution of Kashmir in 1959,[163] the appointment of the Election Tribunal was to be made by the Election Commissioner of India and not the Sadar-i-Riyasat (now the Governor). But the laws of the State were to govern the choice of the Indian Election Commissioner in appointing an Election Tribunal for the State. He was be obliged to appoint only such persons as are, in the opinion of the High Court, qualified to be so appointed. This, however, is only of academic

"Disputes regarding elections". This also shows the gradual shift of the State towards cordiality with rest of the country.

160 Article 136 made applicable to Kashmir with effect from 26th January, 1960 vide *C.O. 10.*

161 *Durgashanker* v. *Raghuraj* (1955 S.C.R. 267).

162 Section 94, *People's Representation Act, 1957* (Act 4 of 1957).

163 *Constitution of Jammu and Kashmir (First) Amendment Act*, 1959 (Act XIX of 1959).

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interest now because of Act XI of 1967, which has brought the position at par with the other States. Eight elections have been held in Kashmir since the promulgation of the present constitution in 1957.

The Jammu and Kashmir Legislative Assembly was kept in suspended animation by a proclamation of the Governor in 1989 and subsequently by another proclamation issued by the Governor it was dissolved. The question of dissolution of the Assembly is *sub judice* in the High Court of Jammu and Kashmir. No elections have been held in the state after 1987.

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8

The Constitution of Jammu and Kashmir—II

(1) EXECUTIVE

The doctrine of separation of powers—that the executive, legislative and judicial functions should each be vested in a separate and distinct body of individuals—which obsessed the American Founding Fathers has proved impossible to observe literally. In practice it does not seem to be essential to good government, but in most modern constitutions an attempt is made to separate these functions in so far as it can be done without prejudice to administrative efficiency. By Section 5 of the Jammu and Kashmir Constitution, 1939,[1] all powers "executive, judicial and legislative" were vested in the Ruler. Such a provision is a relic of the feudal age, out of place in a modern democratic constitution. In the Jammu and Kashmir Constitution, 1957 therefore these powers have been separated.

The executive power may be defined as "the authority within the State which administers the law, carries on the business of government and maintains order within and security from without the State".[2] While dealing with the question as to what the executive power of the State connotes, the Supreme Court

1 Act XIV of s. 1996 (1939 A.D.). See Chapter 3 also.

2 Wynes, W.A., *Legislative, Executive and Judicial powers in Australia.* Australia, 2nd edition, 1956, p. 513.

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of India has held, that it "connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject of course to the provisions of the Constitution or of any law".[3]

The executive power of the Jammu and Kashmir State vests in the Head of the State, called the Governor.[4] [By the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, 'Sadar-i-Riyasat' has been substituted by the Governor.][5]

Prior to the amendment made in 1965, the Head of the State had to be a permanent resident of the State and had to be indirectly elected by the legislature. However, vide the Sixth Amendment Act, 1965 the Governor shall be appointed by the President of India by warrant under his hand and seal.[6] The normal term of the Governor is five years but notwithstanding the expiration of his term he shall continue to hold office until his successor enters upon the office. The Governor holds office during the pleasure of the President but he may, by writing under his hand addressed to the President resign his office. No person, however, shall be eligible for appointment as a Governor unless he is a citizen of India and has completed the age of thirty years.[7]

The Governor shall not be a member of either House of the legislature and if a member of either house is appointed the Governor, he shall be deemed to have vacated his seat in the House on the date on which he enters upon his office as a Governor.[8] The Governor is debarred from holding any other office of profit.[9] The Governor, and any person discharging the functions of the Governor shall, before entering upon his office make and subscribe in the presence of the Chief Justice of the High Court or in his absence, the senior most Judge of that Court available, an oath or affirmation in the prescribed

3 *Ram Jawaya Kapur* v. *State of Punjab* (1955) 2 S.C.R. 223 (236).
4 *Constitution of Jammu & Kashmir*, Section 26.
5 *Sixth Amendment Act, 1955*, Section 2.
6 *Constitution of Jammu and Kashmir*, Section 27. See also, *Mohd. Maqbool Damnoo* v. *State of Jammu & Kashmir* 1972 JKLR 319.
7 *Ibid.*, Section 29.
8 *Constitution of Jammu and Kashmir*, Section 30.
9 *Ibid.*, Section 30(2).

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form.[10] The Governor is the Head of the State and not the Head of the Government or the Council of Ministers.[11] He appoints the Chief Minister.[12] (The term Chief Minister has been substituted by the Sixth Amendment Act, 1965 for 'Prime Minister').[13] The ministers, other than the Chief Minister, are appointed by the Governor on the advice of the Chief Minister.[14] The Deputy Ministers are also appointed by the Governor from amongst the legislators on the advice of the Chief Minister.[15] The Governor exercises all his functions, except the appointment of the Chief Minister and the other ministers[16], the appointment of the Deputy Ministers[17] and the issuing of a proclamation in cases of breakdown of constitutional machinery in the state[18], *only* on the advice of his Council of Ministers.[19]

Prior to the Jammu and Kashmir (Sixth Amendment) Act, 1965, the Head of the State i.e. The Sadar-i-Riyasat, could be removed, for violation of the Constitution, by an address in the legislature supported by a majority of not less than two third of its total membership, recommending to the President to remove him.[20] After the amendment this method of removal of the Head of the State has been done away with. The Constitution contemplates a vacancy in the office of the Governor by reasons other than those of his death or resignation and provides that in such a case the President may make such provision as he thinks fit for discharge of the functions of the Governor.[21] Since, all the executive actions of the Government must be expressed as taken in the name of the Governor,[22]

10 *Constitution of Jammu and Kashmir*, Section 31.
11 *Ibid.*, Section 26.
12 *Ibid.*, Section 36.
13 *Sixth Amendment Act, 1965*, Section 2.
14 *Constitution of Jammu & Kashmir*, Section 36.
15 *Ibid.*, Section 38.
16 *Ibid.*, Section 36.
17 *Ibid.*, Section 38.
18 *Ibid.*, Section 92.
19 *Ibid.*, Section 35(2).
20 *Sixth Amendment Act, 1965*, Section 2.
21 *Constitution of Jammu & Kashmir*, Section 33.
22 *Ibid.*, Section 45.

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that office cannot be allowed to remain vacant. The Governor makes rules of business for the Government of the State.[23] The Advocate General for the State is also appointed by the Governor of the State,[24] though in actual effect he only acts upon the advice of the council of ministers in this behalf.

(i) Powers of the Sadar-i-Riyasat (now the Governor)*

The Sadar-i-Riyasat (now the Governor) is the Head of the State and exercises the executive powers of the State, either personally or through officers subordinate to him.[25] In this connection 'ministers have been held[26] to be officers subordinate'. The Legislature can, however, vest the executive functions in authorities other than the Governor also.[27]

One characteristic of Constitution of Kashmir is that the Sadar-i-Riyasat (now the Governor) is obliged to exercise his executive functions other than those under Sections 36 38 and 92 *only on the advice* of the Council of Ministers.[28] But since the courts cannot declare an act invalid on the grounds that it was not done in conformity with ministerial advice or that it was done by the Governor without seeking the advice of the ministers,[29] it might be thought that the provisions defining the powers which the Governor must exercise on ministerial advice are unenforceable. The author, however, feels that it is not so. The Governor is bound to abide by the Constitution[30] and therefore if he does an act contrary to the Constitutional provisions, it will be a violation of the Constitution. It is true that the courts cannot interfere in the matter, but the interference by the legislature has not been barred. In such a case

23 *Constitution of Jammu and Kashmir*, Section 43.
24 *Ibid.*, Section 42.
* *Substituted* by Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, Section 2.
25 *Constitution of Jammu and Kashmir*, Section 26(2).
26 *Tara Singh* v. *State* [A.I.R. (1958) Pb. 302].
27 *Constitution of Jammu and Kashmir*, Section 26(3).
28 *Ibid.*, Section 35(2).
29 *Ibid.*, Section 35(3).
30 *Ibid.*, Section 31.

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the legislature could pass a resolution for the removal of the Sadar-i-Riyasat on the grounds of the violation of the Constitution and present it to the President for removing the Sadar-i-Riyasat.[31] (The position has changed since 1965). With this force behind Section 35(2) we find that, although unenforceable in a court, yet the clause to "*act only on the advice of council of ministers* is not merely a convention but forms a part of the Constitutional law of the State. Sir Ivor Jennings suggests that such words are merely 'conventions'.[32] His observations may be right in so far as the Constitution of Ceylon (now Sri Lanka) is concerned, because there the conventions form a part of the Constitutional law, but so far as Kashmir is concerned, the Constitution specifically restricts the powers of the Governor. Of course, such restrictions may put the Governor in a dilemma. He must act on the advice of his ministers and he must not act contrary to the Constitution. What is he to do if he is advised to do something he believes to be repugnant to the Constitution? Since, the ministers hold office at his pleasure,[33] he might possibly dismiss the ministers and save himself from acting in an unconstitutional manner by appointing other ministers, who would give him such advice as he deems constitutionally right. If he could not choose such successors, he might dissolve the legislature by virtue of his powers under Section 53(2) (b). No doubt such a situation is unlikely to arise, but its possibility cannot be ruled out. The constitution, however, is silent on such a hypothetical emergency and only practice and only convention can work out a compromise between the Governor and his ministers in such a situation. As a last resort, if the situation is such that government cannot be carried on in accordance with the constitution, the Governor can, with the concurrence of the President, issue a Proclamation assuming the executive and legislative functions of the State.[34] In India powers of the

31 *Constitution of Jammu and Kashmir*, Section 32. This section has been deleted by the Sixth Amendment Act, 1965.

32 Jennings, Sir Ivor and Tambiah, H.W., *The Dominion of Ceylon—The development of its laws and constitution*, London, 1952, pp. 66-71.

33 *Constitution of Jammu and Kashmir*, Section 39.

34 *Ibid.*, Section 92.

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President and the Governors are such that there is no provision which desires them to act *only* on the advice of their council of ministers. The presumption, however, is that they will not disregard their advice. But this is only a presumption; the Constitution of India does not say so in so many words.

The main reason for weakening of the position of the Governor is the formal recognition of Chief Minister as the *de facto* Head of the administration for most purposes and the abolition of the monarchical form of government. However, the Governor is empowered by the Constitution to issue a proclamation in case of breakdown of the constitutional machinery.[35] This power is to be exercised by him in his discretion,[36] subject only to the concurrence of the President of India.[37] In the other Indian States this power is vested, not in the Governors, but in the President of India,[38] who no doubt, acts on the advice of his Council of Ministers, since he is not specifically empowered to discharge any functions in his discretion.

All executive orders are to be issued in the name of the Governor, and if they are authenticated in accordance with the rules made by the Governor, the courts may not enquire into the question whether they were in fact made by the Governor or not.[39] In India upto the present time both as regards contracts and administrative orders, whether failure by government to comply with a formality prescribed in the constitution renders the order or contract a nullity or not has been a matter of controversy. For instance in *Dattatreya's case*[40] the Supreme Court held that the provision that all 'executive actions of the Government of India shall be expressed to be taken in the name of the President' is 'directory and not mandatory' and failure to comply with such a formality will not render the order a nul-

35 *Constitution of Jammu and Kashmir*, Section 92.
36 *Ibid.*, Section 35(2).
37 *Ibid.*, Section 92(1)
38 *Constitution of India*, Article 356.
39 *Constitution of Jammu and Kashmir*, Section 45.
40 *Dattatreya* v. *State* [A.I.R. (1952) S.C. 181]. See also *State of Bombay* v. *Purshotam* (1952) S.C.R. 674.

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lity. But now it seems that the Supreme Court is taking the opposite view and to hold any failure to comply with formalities prescribed in the constitution invalidates what has been done.[41] In *Karam Chand's case* it held that compliance with the constitutional formalities was essential but pointed out that in the case of a contract or assurance it was possible for the President or the Governor to give orders in the form applicable only to the 'particular case'. In the case of an administrative order or notification however, the constitution specifically prescribes that they must be made in accordance with the rules made by the President and this seems hardly a sufficient ground for urging that in the case of an administrative order or notification failure to comply with the constitutional formalities is merely an irregularity. In the opi ion of this author failure to conform to formalities prescribed in the Constitution may render an administrative order invalid.

The Governor appoints the Chief Minister at his discretion and the remaining ministers at the advice of the Chief Minister.[41a] The Constitution does not specify the number of remaining ministers and it is left to the choice of the Chief Minister depending upon the necessity of the situation. The appointment of the deputy ministers is also made by the Governor but he must exercise his powers after seeking the advice of the Chief Minister. The Deputy Minister, at the time of his appointment, must be a member of one or the other house of the legislature.[42] Whereas it is not necessary for a minister to be a member of the legislature at the time of his appointment, if he is not a member of one house or the other for six consecutive months, he ceases to be a minister. All ministers and deputy ministers hold office at the pleasure of the Governor.[43] This means no more than that the power of dismissal is vested in the Governor but he cannot normally exercise it except on the advice of the Chief Minister.

The Constitution provides[44] that the Governor must be kept

41 *Bihar* v. *Karam Chand* (1962) S.C J. 17.
41a *Constitution of Jammu and Kashmir*, Section 36.
42 *Ibid.*, Section 38.
43 *Ibid.*, Section 39.
44 *Ibid.*, Section 44(1).

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informed of the executive decisions and legislative programme of the ministers. He may also call for any information relating to the administration and the legislation.[45] The Constitution also empowers him to have the decision of a single minister considered by the whole council of ministers.[46] This provision ensures the collective responsibility and solidarity of the Council of Ministers. It is a safeguard against departmental decisions prejudicial to other departments or general government policy and is also a safeguard against an arbitrary and hasty decision of an individual minister.

The Governor summons and prorogues the assembly.[47] However, six months must not intervene between its last sitting in one session and the date of commencement of its first sitting in the next session.[48] The Governor can dissolve the legislative assembly[49] *but only on the advice of* his Council of Ministers. Thus, if the ministry in office does not favour a dissolution, the Governor cannot dissolve the Assembly, but he could exercise his power to issue a Proclamation stating that the Constitution has broken down and assume the executive and legislative powers of the State.[50] At the commencement of the first session after the General Elections and the first session of each year, the Governor addresses both Houses [51] This address is open to discussion. He may also send messages to the legislature which it is obliged to consider.[52] He may summon either or both Houses and address them at any time,[53] this will enable the Governor to appeal from the Council of Ministers to the legislature, if offered advice he is not willing to follow. If his appeal was successful, the ministry would presumably tender its resignation. Unless the ministry is in such a powerful position that it can carry the House in its favour, the mere threat by the

45 *Constitution of Jammu and Kashmir*, Section 44(b).
46 *Ibid.*, Section 44(c).
47 *Ibid.*, Section 53(2).
48 *Ibid.*, Section 53(1).
49 *Ibid.*, Section 53(2).
50 *Ibid.*, Section 92.
51 *Ibid.*, Section 55.
52 *Ibid.*, Section 54(2).
53 *Ibid.*, Section 54(1).

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Governor would make the ministry reluctant to tender unwelcome advice. He may veto Bills passed by the legislature and return the Bills other than a money Bill, for reconsideration with his suggestions. But if the Bill is passed again, with or without acceptance of his suggestions, and presented to him for assent, he cannot withhold his assent and his power of veto will lapse.[54] Normally, however, the Governor will not refuse his assent, except on the advice of his Council of Ministers, which might be employed to prevent a private Bill becoming law.

The provisions of Section 46 read with Section 91 of the Constitution unmistakably show that if the Legislature is competent to make law in respect of a matter, then for such period when the Legislature is not in Session the Governor has the power to make laws in respect of that matter. As the Legislature could even after granting permission to withdraw the Bill once again allow the introduction of the Bill and enact it into a law, the Governor cannot be denied the power to promulgate an Ordinance in respect of that matter in exercise of the powers under Section 91 (1) of the State Constitution.[54a]

The power of the Governor to grant pardons, reprieves, respites or remission of punishment under the State Constitution[55] extends to offences under the laws to which the excutive power of the State extends. He may also commute a death sentence for the offence to which the criminal law of the State extends. For offences to which the executive power of the State does not extend, viz. 'foreign affairs, defence and communications', the President of India can grant pardons, reprieves etc., under Article 72(1) of the Constitution of India. The power to commute death sentences also vests in the President of India.[56]

Sections 91 and 92 of the Constitution of Jammu and Kashmir deal with the emergency powers of the Governor. Section 91 empowers him to legislate by Ordinance in circumstances which require immediate action. This power can be used only when both houses of the legislature are not in session and the power is limited to the laws which are within the competence of the State Legislature. The Governor cannot make any Ordinance with respect to a matter which has been surrendered to the Union Parliament. An Ordinance promulgated by the Governor is also subject to judicial review, though the scope would be very limited. If the court is satisfied that

54 *Constitution of Jammu and Kashmir,* Section 78.

54a *Modiera Bottlers* v. *State of J & K* 1989 JKLR 62.

55 *Ibid.,* Section 34.

56 *Constitution of India*, Articles 72 & 73.

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the Governor was satisfied about the necessity to promulgate an Ordinance, the enquiry must thereafter stop. The satisfaction which the Governor is required to arrive at is a subjective one and cannot be tested by reference to any objective test formulated by the Court. The satisfaction has been deliberately and advisedly made subjective by the framers of the Constitution because the matters in respect of which he has to be satisfied are of such a nature that its decision must necessarily be left to the Council of Ministers which aids and advises the Governor and on whose advice 'only' he can act. It cannot, therefore by its very nature be a subject matter for judicial determination and a court of law cannot go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Council of Ministers is based. The Court has, however, the power and competence to enquire whether or not the Governor was satisfied and this enquiry may in a given case cover the ambit of investigation to examine the contention that the satisfaction of the Governor is malafied or based on wholly extraneous or irrelevant grounds because in that event there would be strictly speaking no satisfaction of the Governor in regard to the matters in respect of which he is required to be satisfied and since the satisfaction of the Governor is a condition precedent to the exercise of powers under 91(1) of the State Constitution, the Court has the power and competence to look into the question of satisfaction when it is questioned on the ground that it was malafide or based on wholly extraneous or irrelevant grounds.[56a]

"The bar envisaged by sub-section (3) of Section 91, viz., that the satisfaction of the Governor is final and conclusive and cannot be assailed in any court on any ground, cannot therefore, apply where the challenge is not that the satisfication is improper or unjustified or not based on sufficient material but that there is no satisfaction at all. Similarly, whether or not circumstances did exist which expower the Governor to issue an Ordinance is not a matter which is justiciable becuase the existance of the circumstances has to be based on the subjective satisfication of the Governor.[56a] An Ordinance made by the Governor will be laid before the Assembly when it re-assembles. After the re-assembly, if the legislature disapproves of the Ordinance, it shall cease to have effect immediately but, if not, it shall continue in force for six weeks from the date of the re-assembly of the legislature. No fixed period for the duration of an Ordinance is provided in the Constitution. It will depend on the Governor, for the power to summon the legislature is

56a *Modiera Bottlers* v. *State of J & K* 1989 JKLR 62. See also, *S.R. Bommai & Anr.* v. *UOI & others* 1994 II Apex Decisions S.C.

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vested in him and he can always delay it, provided that six months does not lapse between the commencement of the next session and the conclusion of the last. Thus, the life of an Ordinance cannot be more than six months and six weeks. The Governor may, however, withdraw the Ordinance at any time without assigning any reasons.[57] The Governor is the sole judge of the existence of circumstances rendering immediate action necessary and he may promulgate such measures as the circumstances appear to him to require. He is not bound to give his reasons or to prove the existence of the State of Emergency. This is not a justiciable matter which the court can be called on to determine.[58]

Section 92 makes provisions in cases of the breakdown of Constitutional mechinery in the State. It provides that, if the the Governor is satisfied that a situation has arisen in which the Government of the State cannot be carried out in accordance with the provisions of the Constitution, he may assume to himself all or any of the functions of the Government other than the powers of the High Court. He may also assume to himself any of the powers of the legislature and make laws for the State. This power will extend for a period not exceeding six months.[59] During the emergency the Governor can suspend in whole or in part the operation of any provisions of the Constitution.[60] Any such proclamation may be revoked or varied by a subsequent proclamation.[61] The proclamation in case of the breakdown of the Constitutional machinery cannot be made without the concurrence of the President of India and must be placed before the legislature when it is convened.

Section 143 of the Constitution of Kashmir gives the Governor, personal immunity from legal proceedings in respect of acts

57 *Constitution of Jammu and Kashmir*, Section 91(2) (b).

58 See *Lakhinarayan* v. *Province of Bihar* (1950) S.C.J. 32 (35). Vide Amendment of Section 91 by the Constitution of Jammu & Kashmir (Fifteenth Amendment) Act, 1976, Section 2, the satisfaction of the Governor "shall be final and conclusive and shall not be questioned in any court on any ground".

59 *Constitution of Jammu and Kashmir*, Section 92(3).

60 *Ibid.*, Section 92(1)(b).

61 *Ibid.*, Section 92(2).

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done or purported to be done in the exercise of his official powers. Even if an act is *ultra vires* those powers, if it is purported to be done in exercise of them it is protected, at least when done in good faith.[62] Proceedings may be instituted in respect of acts done in his private capacity after giving two months notice in writing. No criminal proceedings may be instituted and no process for arrest or imprisonment may be issued during Governor's terms of office. But simply because he is not personally amenable to the process of the courts, it cannot be said that acts of the State Government done in his name are beyond the scrutiny of the courts in a case where an action lies against the Government. The privilege only extends to the Governor personally. The Consitution does not contain and provision for the immunity of governmental officials for acts done in the discharge of their official duties[63]. It is specifically provided that the State Government may be sued in the name of "The State of Jammu and Kashmir".[64]

Section 26(2) deals with the Excutive powers of the Governor. The section nowhere says that as executive head of the State, his executive powers extend to declaring an order of a judicial or a quasi-judicial authority as null and void. The constitutional obligations of the Governor are restricted to passing of only such orders as are consistent with the statute that enables him to pass such an order.[64a]

No person shall be eligible for appointment as a Governor unless he has attained the age of thirty years.[65]

This discussion indicates that the Governor in Kashmir is the Constitution Head of the State. Whereas in the case of the Indian Union, "it is possible to contend that the Constitution does not sufficiently guard against the President becoming a dictator,"[66] in the case of Jammu and Kashmir it would seem that the limitations on his powers put by Sections 35(2) and 92(6) of the Constitution of Jammu and Kashmir reduce the possiblity of the Governor becoming a dictator to a minimum.

(ii) Council of Ministers

The Council of Ministers is the main executive organ of the government, and its stability is essential for the efficient

62 *Biman Chandra Bose* v. *Dr. H.C. Mukherjee* A.I.R. (1952) Cal 795.

63 The only exception is under Sec. 122(2) when an officer makes or executes a 'contract' on behalf of the Sadar-i-Riyasat.

64 *Constitution of Jammu and Kashmir*, Section 123.

64a *Begun Hamida Malik* v. *State of J & K* 1976 KLJ 347 1976 JKLR 241.

65 *Ibid.*, Section 29 as amended by Constitution of Jammu & Kashmir (Sixth Amendment) Act, 1965, Section 5.

66 Gledhill, Alan, *Constitution of India, p. 108.*

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running of the administration. In Kashmir the party system is developing and it is reasonable to suppose that the council of ministers will become more stable as the system develops.

Though it is within the discretionary power of the Governor to appoint the Chief Minister of his choice,[67] yet, owing to the fundamental principle of cabinet government that the cabinet must have the confidence of the legislature, this choice by the Governor becomes almost automatic in the sense that he will be obliged to appoint as Chief Minister, the leader of the majority party in the House. This is generally regarded as a convention, but the practice is dictated by the necessity of ensuring continuous stable government. It is assumed that this practice will be followed in Kashmir. The discretionary power of the Governor may not seem important if there is a party in the legislature which has an overall majority and whose leader enjoys its confidence, but it becomes important in a situation where there is no such party and a coalition government is essential. It will then be for the Governor to consider what coalitions are possible and choose that most likely to endure. In such a case the British convention is that the "sovereign should not take interest in any particular party but should maintain his impartial position".[68]

Other ministers are also appointed by the Governor but on the advice of the Chief Minister.[69] The Constitution does not lay down how the Prime Minister will choose his colleagues, but owing to the rule of collective responsibility, the Chief Minister will make his council of ministers as broadly representative as possible. He will probably include as least one representative of every region viz. Jammu, Kashmir and Ladakh. He may also appoint a representative of the minority communities viz. pandits from Kashmir and may include a representative from

67 *Constitution of Jammu and Kashmir*, Section 36.

68 Basu, D.D., *Constitution of India*, Vol. I, p. 477.

69 *Constitution of Jammu and Kashmir*, Section 36. 'Chief Minister' substituted for 'Prime Minister' by Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965.

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each of the backward communities, scheduled castes and the other minority group viz. the Sikhs.[70]

A minister on appointment need not be a member of the legislature. He can become a member later, either by election or by nomination by the Governor (the latter method is often referred to as the 'back door' method for getting a particular person in the cabinet and public opinion does not generally approve of it). However, if within six months a minister fails to become a member, he ceases to hold his office automatically.[71] It is not necessary that the ministers should all be members of the Legislative Assembly but, as Sir Ivor Jennings suggests, "the Cabinet has to be a team and not a leading actor with chorus, and the strength of a team sometimes depends on the weakest member".[72] It would seem to be in the best interest of the Government to have the majority of the ministers in the Legislative Assembly, since the ministry is collectively responsible to it.[73] Ministers have a right to speak in both houses.[74]

The allocation of the portfolios is done by the Sadar-i-Riyasat on the advice of the Chief Minister and it is he who also makes rules for the more convenient transaction of the business.[75]

The salaries and allowances of the ministers and deputy ministers have not been laid down in the Constitution. But it is provided[76] that they will be governed by the Act of 1955 and the Act of 1953 respectively. In the result, the ministers would get Rs. 1000/- per month as salary in addition to conveyance allowance[77] and the deputy minister would draw Rs. 800/- per month in addition to Rs. 200/- as car allowance, if a car is maintained, otherwise the actual conveyance expense.[78]

70 The Cabinet in 1963 included all such members. See Government of Jammu and Kashmir, *Hamari Kabina—Aik Tauraf* (in Urdu) (an introduction with our cabinet), Srinagar, 1959.
71 *Constitution of Jammu and Kashmir*, Section 37(2).
72 Jennings, Sir Ivor, *The Constitution of Ceylon*, p. 89.
73 *Constitution of Jammu and Kashmir*, Section 37.
74 *Ibid.*, Section 56.
75 *Ibid.*, Section 43.
76 *Ibid.*, Section 41.
77 Vide Act VI of 1956.
78 Vide Act XVII of 2008 (1951 A.D.).

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The Ministers hold office at the pleasure of the Governor.[79] Thus, he may, if the necessity arises, dismiss the ministers and the deputy ministers, for the power to appoint presumably includes the power to dismiss and the power to appoint is not exercisable *only* on the advice of the ministers [80] But this power will, according to practice and conventions, be exercised by the Governor on the advice of the Chief Minister to remove an undesirable member of the council of ministers. The normal method of removal of a minister from the cabinet is a vote of no-confidence in the minister in the Legislative Assembly, but it may sometimes happen that, though a minister is otherwise undersirable, he commands the support of the House. The power of dismissal by the Governor might be used in such a case. Although the Constitution does not specifically state that the council of ministers can be dissolved by the Sadar-i-Riyasat on grounds of inefficiency or misconduct, it is presumed, since the Governor is obliged to ensure the stability of the administration, he may, if he thinks it necessary, dismiss the cabinet as a whole.[81] Though, no doubt, occasions for the exercise of such

79 *Constitution of Jammu and Kashmir*, Section 39.

80 *Constitution of Jammu and Kashmir*, Section 35(2).

81 The Sadar-i-Riyasat dismissed Sheikh Mohammad Abdullah from the Prime-ministership of Jammu and Kashmir on August 8, 1953 and dissolved the council of ministers headed by him. There had not been any vote of no-confidence against the cabinet in the legislature, but a majority of the mem bers of the Council of Ministers approached the Sadar-i-Riyasat and told him that they cou'd not work collectively with the other two members of the Council namely Sheikh Abdullah and Mirza Afzal Beg, the Prime Minister and the revenue minister respectively. Apart from this the majority group consisting of M/s. Bakshi, Saraf and Dogra submitted memorandum to Sheikh with a copy to the Sadar-i-Ri asat. In this they accused Sheikh of treasonable activities against the State. The Sadar-i-Riyasat had 'other grounds' also to believe that Sheikh was engaged in activities against the security of the State, so, he dismissed Sheikh Abdullah and dissolved the council of ministers headed by him. This, of course, was an exceptional case. In the *Kashmir Conspiracy Case*, the defence has argued that the Sadar-i-Riyasat had no powers to dismiss. In view of the above discussion, it is submitted that the action by the Sadar-i-Riyasat was not *invalid* and

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authority will be rare, yet as Keith observes, "...it will be impossible to say that changed circumstances might not render the exercise of such authority necessary.[82]

Council of Ministers & Dissolution of the House

On dissolution of the House, the Chief Minister or other members of the council are not required either to resign nor can they be dismissed by the Governor implying thereby that they continue in office on that account only. No fresh order is, therefore, required to be made by the Governor authorising the Council of Ministers to continue in the office.[82a]

(iii) Advocate-General

The Advocate-General is the Chief Adviser of the State Government on legal matters and represents the State in legal disputes.[83] He is appointed by the Governor himself and is a person who is qualified under Section 96 to be a judge of the High Court.[84] That is to say, he must have held judicial office in some part of India for not less than ten years or have been for the same period an advocate of a High Court or of two or more High Courts in succession. Although, appointed directly by the Governor, yet his appointment can be challenged as unconstitutional by an individual by an application for *quo warranto*.[85] He is neither a member of the legislature nor a member of the Council of Ministers, but he shares with the ministers the right to address either house of the legislature, This right however, does not empower him to vote in the legislature.[86] For all practical purposes, the position of the Advocate-General for the State would be similar to the Attorney-General of India. And in fact, Section 42 of the Kashmir Constitution is an adaptation of Article 76 of the Constitution of India.

The Advocate-General has a right of audience in all the courts of the State.[87] He holds office at the pleasure of the Governor who also determines his remuneration.[88]

As in India but differing from the position of the Attorney-

that it is difficult to see as how the court will be able to look into the fact of the competency of the Sadar-i-Riyasat. See Chapter 4 also. (Information based on letters and memorandums published in the Current Affairs Publication, Kashmir, New Delhi, 1953.).

82 Keith, A.B, *British Cabinet System*, 1952, p. 92.

82a *B.A. Khan* v. *Dr. Farooq Abdullah*, SLJ 1983 J & K 22.

83 *Constitution of Jammu and Kashmir*, Section 42(2).

84 *Ibid.*, Section 42(1).

85 *Karkare* v. *Shevde* A.I.R. (1952) Nagpur 330.

86 *Constitution of Jammu and Kashmir*, Section 56.

87 *Ibid.*, Section 42(3).

88 *Ibid.*, Section 42(4).

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General in England, the post of the Advocate-General in Kashmir is not a political post.

(2) LEGISLATURE

Whereas in British India, the change from feudalism to democracy has been gradual, in most of the Indian States this change was sudden. Kashmir, however, stands out as probably the only exception which gives it a place of pride in the history of Indian revolution.

In the early thirties while the people in the Indian States dared not raise even a finger against the ruler, in Kashmir, the people were fighting a battle against autocracy. As a result of this popular agitation, the Maharaja of Kashmir, Sir Hari Singh, conceded to the people of the State, a Legislative Assembly called the *Praja Sabha*, in 1934. This establishment was an event of great significance. This Assembly was, however, only meant to hoodwink observers for all powers were vested in His Highness. It was, however, the first step towards the establishment of a separate legislature in the State.

The Jammu and Kashmir Constitution of 1939,[89] provided for a unicameral legislature,[90] comprising of His Highness and the *Praja Sabha*. The powers of this Assembly were very limited,[91] but it did exercise some control, howsoever remote, over the executive. It also became a nursery for the training of legislatures.

The term of the *Praja Sabha* had expired long before the Constitution of India came into force on the 26th January, 1950, and there was no Legislative Assembly functioning in Kashmir at the commencement of the Constitution of India. The only body or authority then functioning was "the authority exercising the powers of legislation under section 5 of the Constitution of Kashmir, 1939"[92] i.e. the Ruler or "a person acting on behalf of the Ruler" i.e. Shree Yuvraj Karan Singh. The

89 Act XIV of s. 1996 (1939 A.D.).
90 *Ibid.*, Section 13(1).
91 See Chapter 3 for discussion on the powers of the *Praja Sabha*.
92 Act XIV of s. 1996 (1939 A.D.).

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Instrument of Accession executed in 1947 did not affect "in any manner the legislative, executive and judicial powers in regard to the government of the State which then vested in the Ruler of the State", observed the Supreme Court of India.[93] So, Shree Yuvraj, who exercised the powers of legislation under the Proclamation of His Highness[94] continued to legislate till he was divested of the powers after the commencement of the Constitution of India.[95] It is to be noted that Section 5 of the Constitution of Kashmir, 1939 was not repealed till 1951[96] and Shree Yuvraj continued to enjoy full powers of legislation, till then.

By the Proclamation of May, 1951, a Constituent Assembly was set up in the State. It was invested with both constituent and legislative powers.

In 1956 the drafting of the Constitution was completed and on 26th January, 1957, the Constitution came into force.[97] The Constitution provided that, until both Houses of the Legislature had been duly constituted and summoned to meet under the provisions of this Constitution, "the Sadar-i-Riyasat and the body functioning as the Constituent Assembly for the State immediately before the commencement of this Constitution shall be the provisional legislature and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on a legislature".[98]

The elections to the first Legislative Assembly under the provisions of the Constitution of Kashmir, 1957, were held in March, 1957. 62.1 per cent of the electorate cast their votes.[99] Every permanent resident of the State, male or female, of the age of eighteen[99a] or over, who had not been disqualified because of unsoundness of mind or for any crime committed, had the right

93 *Prem Nath Kaul* v. *State of Jammu and Kashmir* [A.I.R. (1959) S.C. 749].

94 See Chapter 5 above for text of the Proclamation.

95 Article 372 of the Constitution of India provided that laws in force in any part of the territory of India would continue to remain in force till repealed by an enactment.

96 In 1951, Section 5 was repealed by Act XVII of s. 2008 (1951 A.D.).

97 *Constitution of Jammu and Kashmir,* Section 1.

98 *Ibid,* Section 150.

99 Government of India, *Elections in Kashmir*, 1957, p. 21.

99a Words 'eighteen' substituted for the words 'twenty-one years' by The Constitution of Jammu and Kashmir (Twenty-First Amendment) Act, 1989.

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to vote.[100] The preparation of electoral rolls and the conduct of elections was under the supervision, direction and control of an Election Commissioner appointed by the Sadar-i-Riyasat.[101] (However, vide the First Amendment Act, 1959, this power vests in the Election Commission of India now.)

These elections brought into being a Legislative Assembly which could fairly claim to represent the people of the State. The people's desire to have a Legislative Assembly *representing them and not the Ruler* at last met with success. An Assembly forms an essential part of the government machine in a country governed on democratic principles and to that extent one can say that in Kashmir this fundamental step towards the establishment of a democratic state has been implemented.

The Constitution provides for a bi-cameral legislature.[102] It consists of the Governor and two Houses of the legislature known as the Legislative Assembly and the Legislative Council.[103] These two Houses sit separately and their composition is also based on entirely different principles. This two chamber system is an integral part of the Constitution. Since the two Houses are distinct from each other, we shall consider them separately.

(i) Legislative Assembly

The Legislative Assembly consists of 100 members, chosen by direct elections from the territorial constituencies in the State.[104] But proviso to Section 47 provides that if the Governor is of the *opinion* that women are not adequately represented in the Assembly, he may nominate *not more than two* women to be members thereof. So that the total strength of the Assembly might reach 102.

Considering that womenfolk in Kashmir did not even have the right to vote till 1951,[105] this provision might seem revolu-

100 *Constitution of Jammu and Kashmir*, Section 140.
101 *Ibid*., Section 138.
102 *Ibid*., Section 46.
103 *Ibid*., Section 46.
104 *Ibid*., Section 47(1).
105 See Chapter 7, Section IV above.

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tionary. In the event of the House being divided into two equal parties, the party in office might influence the Governor to nominate two women members of its persuasion and so be in a position to continue in power. This could no doubt be resented by the opposite party and one might doubt whether a party with a majority of two could remain long in office.

Since a part of the territory of the State is under the occupation of an invader, the holding of elections in the entire State is not possible. The Constitution takes into account this situation and provides that till that area "ceases to be so occupied and the people residing in that area elect their representatives," twenty-four seats in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly.[106] This means that in actual effect, at present the total strength of the Legislative Assembly is 76 and not 100.

In addition to the reservation of these twenty-four seats, the Constitution provides for the reservation of seats for the scheduled castes. The number of reserved seats depends, however, on the population of the Scheduled Castes. The number "shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes bears to the population of the State".[107] Originally, this reservation was to continue only for a period of *five years* from the date of the commencement of the Constitution,[108] but by the *Third Amendment Act*, 1961,[109] the period has been extended to *thirteen years* i.e. till 1970 and to *33 years* by the *Seventeenth Amendment Act*, 1979 (Section 2 of Act VIII of 1979) and to 43 years by the Twenty-Second Amendment Act, 1989 (Section 2 of The Constitution of Jammu and Kashmir (Twenty-second Amendment) Act, 1989).

106 *Constitution of Jammu and Kashmir*, Section 48, as amended by the (Twelfth Amendment) Act, 1975.

107 *Ibid.*, Section 49(1).

108 *Ibid.*, Section 49(2).

109 *Constitution of Jammu and Kashmir* (*Third Amendment*) Act, 1961.

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The Legislative Assembly has a life of five years and the period of five years is counted from the date appointed for its first meeting.[110] The Orissa High Court has held that this date refers to the "date of commencement of the first session".[111] The Assembly is, of course, liable to earlier dissolution by the Governor.[112] The proviso to Section 52 empowers the State legislature to prolong the normal life of the Legislative Assembly but subject to the following conditions:

(a) The extension can be made only while a Proclamation of Emergency issued by the President of India under Article 352 of the Constitution of India is in operation; except when such a Proclamation is in force, the legislature cannot extend its own life.

(b) No Act of the State Legislature can provide for more than a year's extension.

(c) In no circumstances can the extension continue beyond six months after the Proclamation has ceased to operate. Vide Section 2 of the *Sixteenth Amendment Act*, 1977, the life has been extended to 6 years.

Section 51 lays down the qualifications for membership of the legislature. Every permanent resident of the State, male or female, who is not less than twenty-five years of age in the case of membership of the Legislative Assembly and not less than thirty years of age in the case of Legislative Council may offer himself as a candidate for election. The legislature may, however, prescribe additional qualifications for membership.[113]

Section 69 prescribes disqualifications for membership; a person is disqualified from membership if he holds an office of profit under the Government of India, the Government of an Indian State, or the Government of Jammu and Kashmir.[114] For the purposes of this section, the Minister and the Deputy Minister are *not* deemed to hold an office of profit under the Government.[115] The principle underlying this disqualification is

110 *Constitution of Jammu and Kashmir*, Section 52. Increased to "six years" from "five years" by *The Sixteen Amendment Act of 1977* (vide Section 2).

111 *Saradhkar* v. *Legislative Assembly* A.I.R. (1952) Orissa 234 at 236.

112 *Constitution of Jammu and Kashmir*, Section 53(2) (b)

113 *Ibid.*, Section 51 (c).

114 *Constitution of Jammu and Kashmir*, Section 59(1) (a).

115 *Ibid.*, Section 69(2). (See also The Representation of People Act, 1957, Section 24 to 26). The term 'office of profit' has not been

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that there should be no conflict between the duties of a member as such, and his private interests. A person who has been declared of unsound mind by a competent court[116] or who is an undischarged insolvent is also disqualified.[117] There is a further disqualification for those persons who have voluntarily acquired the citizenship of a foreign State or who are under acknowledgment of adherence or allegiance to a foreign State.[118] But the disqualification under the present section would apply only if there is a complete change of adherence. Thus, students from Kashmir in the United Kingdom would not be disqualified because they owe limited allegiance to the British Crown while in U.K., if they are otherwise qualified. Other disqualifications may be imposed by law. Amendment made in 1979 which aims at curbing the evil of defection is one such instance.[119]

No person can be a member of both Houses simultaneously[120] nor can any person be a member both of the State Legislature and the Union Parliament.[121]

Article 103 of the Constitution of India empowers the President in the case of a member of Parliament and Article 192 of the Constitution of India the Governor in the case of a member of a State Legislature to declare a member disqualified on the grounds that:

(a) he holds an office of profit under the Government of India or State Government;
(b) he has been declared of unsound mind by a competent court;
(c) he is an undischarged insolvent;

defined in the Constitution, and the interpretation of this term has led to some difficulties in Britain. It is not certain whether the British interpretation would be followed in Kashmir, but the presumption however is that it would be.

116 *Constitution of Jammu and Kashmir*, Section 69(1) (b).
117 *Ibid.*, Section 69(1)(c).
118 *Ibid*, Section 69(1)(d).
119 Section 24-G added to the Representation of People Act, 1957 by the Amending Act of 1979.
120 *Constitution of Jammu and Kashmir*, Section 68(1).
121 *Constitution of India*, Article 101.

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(d) he is not a citizen of India or has acquired foreign citizenship; and

(e) he is disqualified by or under any law made by the Parliament,

in accordance with the opinion of the Election Commissioner, and his decision is final. In Kashmir, the decision on questions as to disqualifications of members does not lie with the Governor but with the *Speaker* or the Chairman, as the case may be. If it is represented to the speaker/chairman that a member is disqualified and the member does not admit it, the matter is referred to the State High Court whose decision is final.[122] A penalty of Rupees One hundred per day may be imposed on a person who sits in the legislature, knowing that he is not qualified to sit.[123]

The Legislative Assembly elects from amongst its members, the Speaker and the Deputy Speaker.[124] The Speaker or Deputy Speaker may be removed on a resolution of the Assembly passed by the majority of all the members, provided fourteen days notice to move the resolution had been given.[125] Clause (b) to section 58 provides that the Speaker or the Deputy Speaker can resign from his office by writing under his hand, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker. It is clear from the terms of this section that the resignation by one has to be addressed to the other and to nobody else. Thus, it would seem that if the office of the Speaker is already vacant owing to his resignation, a Deputy Speaker will not be able to resign till a new Speaker is elected and a similar difficulty would arise if the office of the Deputy Speaker is vacant. But if the absence is caused by reasons other than the resignation, Section 59 provides that in the absence of the Speaker and the Deputy Speaker, such person as is determined by the Rules or by the Assembly [shall preside. Ordinarily,

122 *Constitution of Jammu and Kashmir*, Section 70.
123 *Ibid.*, Section 71.
124 *Ibid.*, Section 57.
125 *Ibid.*, Section 58.

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though a member of the House, the Speaker does not vote. He has a casting vote in the event of a tie.[126]

(ii) Legislative Council

The Legislative Council consists of 36 members.[127] Out of these thirty-six members, eleven are elected by the Legislative Assembly from amongst persons who are residents of Kashmir and are not members of the Legislative Assembly. Of these eleven members at least one must be a resident of *Ladakh* province and one other of *Kargil*.[128] Eleven members are elected in the same manner from amongst the residents of Jammu province who are not members of the Legislative Assembly; these eleven must include at least one member from each of the two districts of *Doda* and *Poonch*.[129] One member is elected by each of the following constituencies:

(a) the members of municipal council, town area committees and notified area committees in the province of Kashmir;
(b) the members of the municipal council, town area committees and the notified area committees in the province of Jammu;
(c) teachers of Kashmir province, and
(d) teachers of Jammu province.[130]

Two members shall be elected by each of the following constituencies:

(a) panchayats and specified local bodies in Kashmir; and
(b) panchayats and specified local bodies in Jammu.[131]

126 *Constitution of Jammu and Kashmir*, Section 67(2).
127 *Ibid.*, Section 50(1).
128 *Ibid.*, Section 50(2).
129 *Ibid.*, Section 50(3).
130 *Ibid.*, Section 50(4). Clauses (c) and (d) omitted by Fifth Amendment Act, 1963.
131 *Ibid.*, Section 50(5).

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Besides these the Governor nominates eight members, not more than three of whom must belong to the socially and economically backward classes in the State, the others must be persons having special knowledge or practical experience in respect of matters such as Literature, Science, Art, Co-operative movement and Social service.[132] Thus, the Council of State would provide an opportunity for persons of intellectual capacity and experience of affairs, who are not otherwise willing to go through the electioneering process, to help the State with their experience and knowledge.

Section 52(2) provides for changes in membership of the Legislative Council so as to ensure continuity in the life of that chamber; one-third of the members retire every second year. This distinguishes the Assembly from the Council which resembles the Senate in the U.S.A. The method of election to the Council is, of course, indirect but this Upper Chamber is not hereditary like the House of Lords in Britain.

Members of upper house have the same privileges as are enjoyed by members of lower house.[132a]

(iii) Legislative Procedure

Except in so far as it is prescribed by the Constitution, each House regulates its own procedure but the pre-existing rules of the Constituent Assembly of Jammu and Kashmir, which functioned as the provisional legislature remains in force until superseded.[133] Except for the amendment of the Constitution,[134] all questions are to be decided by a majority of the members of the House present.[135] A quorum of twenty in the case of Assembly and ten in the case of Council is necessary.[136]

The legislature is summoned by the Governor and it is by him that it is prorogued or dissolved. The modern practice is that the same proclamation both dissolves the old legislature and summons the new one.

132 *Constitution of Jammu and Kashmir,* Section 50(6) as amended by the Fifth Amendment Act, 1963.

132a *P.L. Handoo* v. *Hon'ble Speaker,* SLJ 1986 J & K 41.

133 *Constitution of Jammu and Kashmir,* Section 85.

134 *Ibid,* Section 147.

135 *Ibid,* Section 67.

136 *Ibid,* Section 65.

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Bills other than money Bills may be introduced in either House,[137] but must be passed by both the Houses.[138] A Bill pending in the legislature does not lapse by reason of the prorogation of the House or Houses thereof.[139] A Bill pending in the Legislative Council, which has not been passed by the Legislative Assembly does not lapse on the dissolution of the Assembly[140] but a Bill which is pending in the Legislative Assembly or which, having been passed by the Legislative Assembly, is pending in the Legislative Council, lapses on a dissolution of the Assembly.[141]

The architects of the Constitution of Kashmir have so devised the relative powers of the two chambers that the Legislative Council cannot veto Bills passed by the Legislative Assembly. It cannot claim equal and co-ordinate legislative capacity with the Assembly. The Council can only delay the passage of hasty and ill-considered legislation by the Assembly and in some circumstances invoke the judgment of the electorate. It can be a centre of resistance to the abuse of legislative power. The Constitution makes provision for a deadlock between the two chambers by Section 75 which lays down:

"(1) If after a Bill has been passed by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council, or,
(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or
(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Legislative Assembly may subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such

137 *Constitution of Jammu and Kashmir*, Section 74(1).
138 *Ibid.*, Section 74(2).
139 *Ibid.*, Section 74(3).
140 *Ibid.*, Section 74(4).
141 *Ibid*, Section 74(5).

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amendments if any, as have been made, suggested, or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or
(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill passed by it; or
(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Bill shall be deemed to have been passed by the House of the Legislature in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly."

The Legislative Council in Kashmir can rarely do more than suggest amendments to Bills passed by the lower house. It cannot usurp or override the decisive authority of the democratically elected Legislative Assembly, which is the custodian of the nation's will. If the rejection of a Bill by the Council were followed by a dissolution of the Assembly, and the electorate expressed its approval of the Bill, the Council would persumably withdraw its objection to the Bill.

The Constitution does not specifically provide for the situation when a Bill, other than a money Bill, which originated in the Legislative Council and was passed by it, is rejected in the Legislative Assembly, but it would seem that the Assembly's disapproval means the death of the Bill. A Bill which has been passed by both the Houses must receive the assent of the Governor to became a law.[142]

142 *Constitution of Jammu and Kashmir*, Section 73.

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"The Legislature, under the constitution of Jammu and Kashmir has, within the prescribed limits powers to make laws both prospectively as well as retrospectively. The power of the Governor to promulgate Ordinance, is co-extensive with legislative powers. It is now well settled that within is legislative competence, a legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but not legislature in this country has, however, the power to ask the instrumentalities of the State to disobey or disregard the decision given by the Courts. The legislature has no power to overrule the decision of a competent court of law and any law which it enacts with a view to overrule the decision of the court would be beyond its competence and therefore, invalid. The legislature cannot overrule the decision given by a court of law. It must accept the correctness of the decision given by competent court, though it may amend the law with restrospective operation whereby such decision is automatically naturalised. The legislature can legislate but cannot perform judicial functions of adjudication."

"It is permissible for the legislature to remove the basis on which a decision of the competent court is based, provided that by doing so, it does not itself overrule the decision. The legislature must accept the correctness of the decision and may through the amendment remove the basis of that decision. The legislature can only legislate and not perform any judicial functions of adjudication. The legislature may alter the law in restrospect so as to ineffect, nullify the effect of the decision by removing or changing the basis. The legislature within its legislative competence can also remove the basis on which a cause of action is founded by a litigant during the pendency of that litigation and thereby in effect, render the litigation infructuous, provided that the legislature does not itself directly decide the cases pending in the courts of law. The legislature which has the competence to remove the basis so as to modify the effect of and adverse decision cannot be prevented in law remove the basis before a decision is given by the court of law on the particular matter provided the legislation is within its legislative competence.[142a]

142 *Constitution of Jammu and Kashmir,* Section 78.
142a *Modiera Bottlers* v. *J & K State* 1989 JKLR 62.

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(iv) Money Bills and Procedure in Financial Matters

Sections 76 and 77 lay down provisions with regard to *Money Bills*. A Money Bill must always originate in the Legislative Assembly and cannot be introduced in the Legislative Council.[143] It is transmitted to the Council only after a Bill has been passed by the Assembly. The Council *cannot* reject or amend a Money Bill. All that the Council can do is to suggest amendments, which the Legislative Assembly may or may not accept.[144] The Bill must be returned by the Council to the Assembly within fourteen days of its receipt. If the Assembly accepts any recommendations of the Council, the Bill is deemed to have been passed by both the Houses with the accepted amendments; if the Assembly does not accept any such recommendations, the Bill is deemed to have been passed by both Houses in the form in which it was passed by the Assembly. If the Bill remains pending in the Council for more than fourteen days, it is deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly.

The Constitution defines a Money Bill as dealing 'only' with one or more of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax;
(b) the regulation of the borrowing money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;
(c) the custody of Consolidated Fund or the Contingency Fund of the State, or the payment of money into or the withdrawal of money from any such Fund;
(d) the appropriation of money out of the Consolidated Fund of the State;
(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of amount of any such expenditure;

143 *Constitution of Jammu and Kashmir*, Section 76(1).
144 *Ibid.*, Section 76(2).

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(f) the receipt of money on account of the Consolidated Fund of the State or the Public account of the State or the custody or issue of such money; or

(g) any matter incidental to any of the matters specified in clauses (a) to (f).[145]

But a Bill which imposes fines, penalties or licence fee, or deals with taxes imposed by local authorities is neither a Money Bill[146] nor a Financial Bill.[147]

The word '*only*' in the definition of the Money Bill implies that a Bill shall be deemed to be a Money Bill if it contains any of the provisions in clauses (a) to (g) of Section 77 "without any extraneous provisions".[148] The object is to safeguard the Council against abuse of power by the lower House. But the decision of a speaker that a Bill introduced in the Assembly is a Money Bill is final[149] and his certificate to that effect on the Bill is conclusive when it is transmitted to the Council or presented to the Governor for assent.[150] The Speaker gives his Certificate by an endorsement at the foot of the Bill as follows:

> "I do hereby certify that this Bill is a Money Bill within the meaning of Section 77 of the Constitution of Jammu and Kashmir."[151]

The "annual financial statement" referred to in Section 79(1) of the Constitution is what is popularly called the '*Budget*'. It is laid before both Houses of the legislature at the instance of the Governor. It is in two parts.[152] The first part, which is open to discussion in the legislature but which is not subject to vote,[153] deals with matters charged on the Consolidated Fund of

145 *Constitution of Jammu and Kashmir*, Section 77(1).
146 *Ibid.*, Section 77(2).
147 *Ibid*, Section 84.
148 Basu, D.D., *Constitution of India*, Vol. I, p. 631.
149 *Constitution of Jammu and Kashmir*, Section 77(3).
150 *Ibid.*, Section 77(4).
151 *Rules of the Legislative Assembly*, 1957.
152 *Constitution of Jammu and Kashmir*, Section 79(2).
153 *Ibid.*, Section 80(1).

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the State and covers:

"(a) the emoluments and allowances of the Governor and other expenditure relating to his office;
(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and of the Chairman and the Deputy Chairman of the Legislative Council;
(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;
(d) expenditure in respect of the salaries and allowances of the judges of the High Court;
(e) any sums required to satisfy any judgment decree or award of any court or arbitral tribunal;
(f) any other expenditure declared by this constitution or by legislature to be so charged."[154]

Bills imposing new charges on Consolidated Fund may not be introduced and considered by the legislature unless they have the *previous* recommendation of the Sadar-i-Riyasat.[155]

The second part of the Statement contains demands for grants to meet anticipated expenditure;[156] these may be assented to, refused or reduced by the legislature,[157] but may not be increased. A demand for a grant can be made only on the recommendation of the Governor. The Annual Appropriation Bill is necessary to authorise payment of money out of the Consolidated Fund.[158] Substantially the same principles apply to Acts passed to provide supplementary grants during the year, votes on account, votes of credit and other legislative authority for the appropriation of money out of the Consolidated Fund.

154 *Constitution of Jammu and Kashmir*, Section 79(3). 'Governor' substituted for Sadar-i-Riyasat in 1965 by the Sixth Amendment Act.
155 *Ibid.*, Section 84(3).
156 *Ibid.*, Section 79(2) (b).
157 *Ibid.*, Section 80(2).
158 *Ibid.*, Section 81.

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They must be introduced in the Legislative Council and on the recommendations of the Governor.[159]

Section 90 of the Constitution of Kashmir corresponds to Article 255 of the Constitution of India and provides that the absence of a previous recommendation to a Bill as required by the Constitution of Kashmir,[160] shall not invalidate the Act, if the Bill, when passed by both Houses of the legislature receives the subsequent assent of the Governor.

(v) Privileges and Immunities

Since the main function of a legislature is "to criticise and legislate",[161] therefore it is of great importance that the members of the legislature should have all such immunities and privileges as are necessary to enable them to perform that function without fear. The Constitution itself deals with freedom of speech and gives legislators greater degree of freedom of speech than the ordinary citizen, in whose case this freedom may be "fettered by laws relating the defamation and contempt of court".[162] This privilege in the case of the members of the legislature though subject to the standing orders of the House is so wide that it embraces within its folds anything said or noted in the House or a committee of it and the publication of proceedings of the House by or under the authority of the legislator.[163] The Constitution provides that all other powers, privileges and immunities of a House of the legislature and of the members thereof shall be those of Parliament of India and of its members until the definition of these privileges by the legislature of the State.[164]

The Courts will not enquire into the validity of the proceedings in the legislature on the grounds of irregularity of pro-

159 *Constitution of Jammu and Kashmir*, Sections 82 and 83 as amended by Sixth Amendment Act, 1965.
160 *Ibid.* Sections 80(3) and 84(1) & (3).
161 Gledhill, Alan, *Constitution of India*, p. 113.
162 *Ibid.*, p. 122.
163 *Constitution of Kashmir*, Section 72(1) and (2).
164 *Ibid.*, Section 72(3).

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cedure.[165] In Britain a remarkable case on the point arose in 1934.[166] Mr. A. P. Herbert (not a member of the House) attempted to institute criminal proceedings against the Kitchen Committee of the House of Commons. What had happened was that Mr. Herbert bought "a glass of lager beer and a glass of gin and mixed vermouth" in a bar in the House of Commons. Mr. Herbert then applied to the Chief Magistrate at Bow Street for summons to be directed to the Kitchen Committee and the manager of the Refreshment Deparment for retailing intoxicating liquor, which they were not entitled to sell, contrary to Section 65(1) of the Licensing (Consolidation) Act, 1910. The Chief Magistrate refused to issue the summons on the ground that he had no jurisdiction to issue such summons. Mr. Herbert then sought an order of *mandamus* from the Divisional Court on the ground that the Chief Magistrate had erroneously held that his jurisdiction was excluded by the privileges of Parliament. The application was rejected by the Lord Chief Justice. The Court held that the Chief Magistrate was justified in refusing to interfere, as the House was acting collectively in a matter falling within the ambit of its own internal affairs.

However, this immunity from judicial interference is confined to matters of 'irregularity of procedure' only and thus in Kashmir, there would be no immunity if the proceedings were held in defiance of the mandatory provisions of the Constitution or by exercising powers which the legislature does not possess under the Constitution.[167] It has been held in India that the question whether the person acting as Speaker of a State legislature had the qualifications required by the Constitution for

165 *Constitution of Kashmir*, Section 89. Also cf. *Kumar Shankar* v. *Cotton* [(1925) 40 C.L.J. 515] when the High Court of Calcutta granted an injunction restraining the President of the Bengal Legislature from placing the demands for Minister's salaries before the council on the grounds of contravention of the Rules of Procedure. This case was decided under the Government of India Act. 1919, which did not exclude the jurisdiction of the Court from proceedings in the Legislature. No such case is possible under Section 89 of Kashmir Constitution.

166 *R.* v. *Graham-Campbell, ex parte Herbert* [(1935) I.K.B. 594].

16 *Anand* v. *Ram Sahay* [A.I.R. (1952) M.B. 31(44)].

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that office was not a matter relating to irregularity of proceedings in the House so that a writ of *quo warranto* under the Constitution would lie to challenge his office.[168]

The Constitution itself forbids the discussion on the conduct of any judge of the Supreme Court of India or of the High Court in the discharge of his duties.[169] This provision is intended to secure the independence of the Judges not only from the Executive but also from the legislature. The present section does not qualify the word 'duties' by the word 'judicial' and thus, the immunity would not be restricted to the 'judicial duties' alone but would also cover all acts done in his official capacity, including for instance his acts done as Chairman of a Commission of Enquiry set up by the Government but it would not extend to acts done in the personal capacity of the judge e.g. as Steward of a Race Club.

The occupant of the Chair In a House of the legislature is empowered to regulate the procedure, conduct of business, and maintenance of Order in the House and he is not subject to the jurisdiction of the courts in "the exercise of these powers".[170] If, for instance, he refuses to allow a member to address the House or orders a member to be removed from the House, the member aggrieved has no remedy in Court.

(vi) Language to be used in the Legislature

The Constitution provides[171] that business in the legislature shall be transacted in Urdu or in English, but a member who cannot express himself adequately either in English or in Urdu, may address the House either in Hindi or in his mother tongue[172] with the permission of the Speaker of the Legislative Assembly or the Chairman of the Legislative Council as the case may be.[173]

In the Indian Parliament the language to be used is either

168 *Nesamony* v. *Varghese* [A I R. (1952) T.C. 66].
169 *Constitution of Jammu and Kashmir*, Section 88.
170 *Constitution of Jammu and Kashmir*, Section 89. See also *Bradlaugh* v. *Clarke* (1883) A.C. 354.
171 *Ibid.*, Section 87(1).
172 *Ibid.*, Section 87(1) proviso.
173 *Constitution of Jammu and Kashmir*, Section 87(1).

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Hindi or English.[174] But in all Indian States the legislature may adopt the official language of the State or any language in use in the State for any official purpose.[175] Article 210 provides that the language to be used in the State legislature shall be the official language of the State, any language used in the State or Hindi or English. In Kashmir Urdu is declared to be the official language of the State.

From the above discussion it is clear that effective steps have been taken to change the system of Government. It is the legislature which provides the Cabinet, and not the Head of the State. In this respect the Constitution follows the Indian system which in turn has been based on the English model. The cabinet system demands that the cabinet cannot remain in office without the consent and support of the elected representatives of the people. This is as near as it is, in practice, possible to get to the ideal of "*government of the people, by the people and for the people*" and to that extent one can say that Kashmir is the first Indian State to have a democratic Constitution of its own choice which can serve as a "beacon for the rest of India".[176]

(3) JUDICIARY

Judicial power is the element of sovereignty concerned with application of the laws. The judiciary in Kashmir acts at once as the interpreter and guardian of the Constitution [177]

The first High Court, comprising a Chief Justice and two puisne judges, was established in the State of Jammu and Kashmir in March 1928, and was styled 'The High Court of Judicature Jammu and Kashmir State'.[178] This was the highest judicial body in the State, although, appeals from it lay to His Highness.

Part IV of the Constitution Act, 1939,[179] dealt with the judicature. Section 48 of the Act contained provisions with regard

174 *Constitution of India*, Article 120(1).
175 *Ibid.*, Article 345.
176 White, M.B , *Halfway to Freedom*, 1949, New York, p. 148.
177 *Constitution of Jammu and Kashmir*, Section 105.
178 Order No. 1 of s. 1985 (1928 A.D.).
179 Act XIV of s. 1996 (1939 A.D.). See also Chapter 3 above.

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to the High Court, and Section 48(a) provided that the High Court referred to in this Act is the High Court established in the State by Order No. 1 of 1985 (1928 A.D.). On 10th September, 1943, Letters Patent were granted to the High Court.[180]

At the apex of the State Judicature stood the "His Highness' Board of Judicial Advisers[181] consisting of as "many members as His Highness may from time to time determine". The Board was to advise His Highness on the disposal of such civil and criminal appeals as, under the law for the time being in force, lay to His Highness from the decisions of the High Court, and on such other matters as His Highness might choose to refer to such Board for advice.[182] (See also Chapter 3 (c) in this behalf).

The accession of Jammu and Kashmir to India was followed by the promulgation of the *Constitution (Application to Jammu and Kashmir) Order*, 1950,[183] by the President of India, specifying the provisions of the Constitution of India which were applicable to the State.

Entry 78 of List I of Seventh Schedule of the Constitution of India deals with the exclusive power of the Union Parliament to legislate on the constitution and organisation of the High Courts in the States. This was, under the Order of 1950, not exercisable with regard to Kashmir, so that the composition and organisation of the High Court remained within the exclusive jurisdiction of the State. Articles 131 and 132 of the Constitution of India, dealing with the original jurisdiction of the Supreme Court of India in disputes between the Government of India and the State or between the States *inter se*, and the appellate jurisdiction of the Supreme Court in constitutional questions only were applied to the State of Jammu and Kashmir. The Supreme Court had no other jurisdiction in the State.

The Delhi Agreement of 1952, extended the jurisdiction of the Supreme Court of India in relation to the State.[184] During the negotiations of 1952, the spokesmen of the Government of

180 *Proclamation of His Highness dated September 10, 1943.*
181 *Act XIV of 1966*, Section 71.
182 *Act XIV of 1996*, Section 71 (2).
183 See Chapter 5 above for detailed discussion.
184 See Chapter 5 'Delhi Agreement'.

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India recommended that the 'Board of Judicial Advisers' should be abolished and the jurisdiction exercised by it should be vested in the Supreme Court of India. This would have made the Supreme Court the final court of appeal in all civil and criminal matters. No agreement was, however, reached on the point and the matter was left for further discussion.[185]

On May 14, 1954, the President of India, in concurrence with the State Government, issued the *Constitution (Application to Jammu and Kashmir) Order, 1954*. This superseded the Constitution Order of 1950 and dealt with the entire Constitutional position of the State within the framework of the Constitution of India.[186] Under this Order, besides the power to issue writs for the enforcement of the fundamental rights, the jurisdiction of the Supreme Court was further extended by giving it the jurisdiction in matters of appeals from the High Court but the Supreme Court was not to have power to grant "special leave for appeal from any court or tribunal in Jammu and Kashmir State" under the provisions of Article 136 of the Constitution of India. This Article was, however, applied to the State by *Constitution (Application to Jammu and Kashmir) Amendment Order, 1960*,[187] with effect from 26-1-1960. In 1954, judicial authority of (His Highness')[188] Board of Judicial Advisers was abolished,[189] and all appeals and proceedings pending before such board at the commencement of the Order of 1954 were transferred to the Supreme Court of India. The Supreme Court held a special sitting in Srinagar in 1954 to dispose of such appeals and proceedings.[189a]

In 1957, the Constitution of Jammu and Kashmir came into force. Part VIII of the Constitution contains provisions with regard to the High Court.

185 Government of Jammu and Kashmir, *India and Kashmir—Constitutional Aspect*, p.21.

186 See Chapter 6 above for discussion.

187 *C.O. 60.*

188 Words 'His Highness' deleted vide Act XV of s. 2009 (1952 A.D.).

189 Act XLVIII of s. 2011 (1954 A.D.).

189a A special bench of Supreme Court comprising of Chief Justice Mehar Chand Mahajan, Justice S.R. Dass and Justice Ghulam Hassan held a sitting in Srinagar in 1954 to dispose of such appeals and proceedings.

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(i) Composition of the High Court, Appointment and Removal of Judges

The High Court of Jammu and Kashmir consists of a Chief Justice and two or more other judges.[190] The Constitution does not fix any maximum number of judges, but provides that the minimum number of Judges of the High Court, excluding the Chief Justice at any time, will be two.[191] The judges exercising jurisdiction in relation to the State immediately before the commencement of the Constitution continue to be so appointed.[192]

The present strength of the High Court is eight permanent (including Chief Justice) and three additional Judges.

The appointment of the judges is made by the President of India.[193] He, however, consults[193a] the following persons in the matter:

(a) Chief Justice of India;

(b) Sadar-i-Riyasat (now the Governor);

(c) Chief Justice of Kashmir.

In the case of the appointment of the Chief Justice of Kashmir, only (a) and (b) will be consulted. The judges hold office until they attain the age of sixty-two years.[194] A candidate for appointment must for at least ten years have held judicial office in the State or in any other part of India, or have been an advocate of the High Court of Kashmir or of any other High Court in India or of two or more such courts in succession.[195] A judge of the High Court may resign his office by writing under his hand addressed to the President of India.[196] A judge of the High Court could be removed by an Order of the President of India after an address for his removal supported by a two-thirds majority has been passed by each House of the State

190 *Constitution of Jammu and Kashmir,* Section 93(1).

191 Act XIV of 1996 (1939 A.D.) had similar provisions. See Chapter 3 ante.

192 *Ibid.*, Section 93(2).

193 *Ibid.*, Section 95.

193a See also, *Supreme Court Advocate on Record Association* v. *Union of India* 1993(5) SLR SC 337.

194 *Ibid.*, Section 95 as amended by the Sixth Amendment Act, 1965.

195 *Ibid.*, Section 96.

196 *Ibid.*, Section 99.

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legislature on the grounds of "proved misbehaviour or incapacity".[197] But this provision has been repealed by the *Constitution of Jammu and Kashmir (First Amendment) Act, 1959*. By C.O. 60, the removal of the judges of the State High Court can only be made after an address for their removal has been passed by Parliament of India and presented to the President in accordance with Article 124(4) of the Constitution of India.

Section 2 of Schedule IV of the Constitution of Jammu and Kashmir (as amended by Act XIX of 1959) reads:

> "...the right in respect of absence (including leave allowances) and pension and other conditions of service of the judges of the High Court shall be governed by the provisions of the *High Court Judges (Conditions of Service) Act, 1954* (Central Act 28 of 1954) for the time being in force as if the Act and the rules were applicable to the judges of the High Court of Jammu and Kashmir... ."

The necessity for such a safeguard becomes obvious from a study of the development of the closer integration of the State's judiciary with the Indian judiciary.

Judges salaries are fixed and like the administrative expenses of the High Court are charged on the Consolidated Fund of the State.[198] By the *Constitution of Jammu and Kashmir (First Amendment) Act, 1959* (Act XIX of 1959), the salaries of the judges in Kashmir have been brought in line with the salaries of the judges in the other High Courts of India.[199]

The Constitution of Jammu and Kashmir does not contain any provision with regard to the transfer of judges from or to the Kashmir High Court; nor did the *Constitution (Application to Jammu and Kashmir) Order, 1954* contain any such provision. But because the judiciary of the State was being integrated with the rest of India, it was felt that such a provision was necessary. Accordingly, *Constitution (Application to Jammu and Kashmir) Amendment Order, 1960*, made Article 222 of the

197 Act XIV of 1996 (1939 A.D.), Section 99 (2) and (3).
198 Act XIV of 1996 (1939 A.D.), Section 108 (3).
199 The Chief Justice's salary will now be Rs. 9000/- per month and the salaries of other judges will be Rs. 8000/- per month.

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Constitution of India, which deals with the transfer of judges from a High Court to the other courts in India, applicable to Jammu and Kashmir with effect from 26-1-1960, but with the following condition:

> "Every such transfer from the High Court of Jammu and Kashmir or to that High Court shall be made after consultations with the Governor."

So the President of India may, in consultations with the Governor, order the transfer of judges from or to the High Court of Jammu and Kashmir. While this is a step towards closer integration, however consultation does not mean concurrence.[199a] This accords with the spirit of the Constitution of Jammu and Kashmir and the Constitution of India (as applicable to the State), which guarantee a marked degree of internal autonomy to the State.

Originally Section 106 of the Constitution of Jammu and Kashmir barred judges of the High Court, who had held office after the commencement of the Constitution from practising before any court or authority in the State. The prohibition affected the judges appointed before the commencement of the Constitution who continued in office after its commencement but not those who had retired before the Constitution commenced. It did not affect ex-judges of other High Courts who came to Kashmir either. This section was repealed by the *Constitution (First Amendment) Act, 1959*, with effect from 26-1-1960 and from that date, by virtue of the *Constitution (Application to Jammu and Kashmir) Amendment Order, 1960* Article 220 of the Constitution of India dealing with such prohibition, was applied to the State. The result is that from 26-1-1960 no person who has been a permanent judge of the High Court may practice before any authority in India except the Supreme Court and other High Courts.

Judges of the High Court enjoy the same immunity as the judges of the Supreme Court of India. No action lies against a judge for any acts done or words spoken in his capacity as a judge. "It is essential in all courts that the judges who are appointed to administer the law should be permitted to adminis-

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ter it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the benefit of a malicious or a corrupt judge, but for the benefit of the public, whose interest it is that the judges shall be at liberty to exercise their functions with independence and without fear of consequences".[200]

(ii) Jurisdiction and Powers of the High Court

Section 94 of the Constitution of Jammu and Kashmir declares:

> "The High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself, or of the courts subordinate to it."

While dealing with the *Court of record*, Dr. Shukla observes in his book on the Constitution of India,[201] "a court of record is one whereof the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has authority to fine and imprison". Article 129 of the Constitution of India declares the Supreme Court of India to be a court of record with the power to punish for contempt of itself. Dr. Ambedkar, the main architect of the Constitution of India, while discussing this Article in the Constituent Assembly of India said that a court of record is "a court the records of which are admitted to be of evidentiary value and they are not to be questioned when they are produced before any court" and then went on to say, "once you make a court, a court of a record by statute, the power to punish for contempt necessarily follows from that position".[202] In England this power is mainly derived from common law, but since neither in India nor in Kashmir, is there any such thing as Common Law, it was deemed necessary to state this power in the statute itself. In Kashmir, under section 94, it has been provided that the State High Court is empowered to "punish

200 *Scott* v. *Stansfield* [1868 L.R. 3 Ex. 220 (223)].
201 Shukla, V.N., *Commentary on the Constitution of India*, p. 121.
202 Constituent Assembly Debates, 1949, Vol. VIII, p. 382.

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for contempt of itself or of court subordinate to it". Thus, contempt proceedings come under the original jurisdiction of the High Court. There is no provision in the Constitution of India in the nature of Section 94 of the Constitution of Jammu and Kashmir. All High Courts in India are, however, empowered under the *Contempt of Courts Act* to punish for contempt of the subordinate courts. Article 215 of the Constitution of India empowers the High Court to punish for contempt of itself.

Contempt of Court is of two types:

(a) *civil*, e.g., failure to comply with an Order or undertaking;
(b) criminal:

(i) *in court*: this includes unruly behaviour; interference with proceedings; refusal to obey presiding officer; speaking disrespectfully of Judge or jury;
(ii) *out of court*: this includes the interference with the course of justice e.g., intimidating a party; corrupting a witness, obstructing legal process, speaking disrespectfully of Court or its officers and commenting on pending proceedings so as to prejudice trial.

Contempt of court includes saying or writing anything about a court which may lower the prestige of the Court or bring it into contempt or hatred and a person guilty of such an act has to be punished. In 1900 the Queen's Bench Division observed,[203] "any act done or writing published calculated to bring a Court or a judge of the Court into contempt or lower his authority is a contempt of Court". The Supreme Court of India summarised it in the following words:

> "The position, therefore, is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a

203 *Queen* v. *Gray* (1900) 2 Q.B.D. 36.

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proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as a Contempt. One is a wrong done to the judge personally while the other is a wrong done to the public... . It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement, it is enough if it is likely or tends in any way to interfere with the proper administration of law."[204]

The High Court of Kashmir has held[205] that the scandalising of the Sub-Judge of a District Court in a public speech, amounts to the Contempt of Court.

Section 101 of the Constitution declares that the usual places of sitting of the High Court shall be Jammu and Srinagar, and sub-clause (3) of the same Section declares that the Court may sit in such other places as the Chief Justice may with the approval of Governer appoint.

Section 102 of the Constitution of Jammu and Kashmir enacts that, subject to the provisions of the Constitution of Jammu and Kashmir and to the provisions of any law in force for the time being, laws administered in the High Court shall be the same as immediately before the commencement of the Constitution. This applies to statutes, precedents, customs usage and personal laws.

Section 56 of the Constitution Act, 1939 dealt with the jurisdiction of the High Court. It contained provisions with regard to the original, appellate and revisional jurisdiction of the High Court. Section 56(2) read:

"The High Court shall have jurisdiction to hear and determine any original suit or other proceedings of which the value is not less than Rupees Twenty Thousand[206] and every

204 *Brahma Prakash* v *State of U.P.* [A.I.R. (1954) S.C. 10].
205 *State* v. *Reshi Kumar Koushal* [A.I.R. (1961) J. & K. 76].
206 Substituted vide Act XLVIII of s. 2011 (1954 A.D.) for "rupees ten thousand" with effect from 8-4-1955.

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such suit or proceeding shall be instituted in the High Court."

The jurisdiction of the High Court of Jammu and Kashmir under the 1957 Constitution extends to any suit or proceeding of value of twenty thousand rupees or over.

The High Court has jurisdiction to entertain and dispose of such appeals, revisions and other cases, civil, criminal and revenue, as it may be empowered to do under any enactment in force in the State. Appeals from the lower courts lie to the High Court and the procedure for filing these appeals is probably contained in the Letters Patent of September 10, 1943. The Code of Civil Procedure is silent on the mode.

Section 103 of the Constitution of Jammu and Kashmir deals with the powers of the High Court to issue certain writs. Article 32(2A) of the Constitution of India empowers the High Court of Jammu and Kashmir to issue writs, orders or directions, including writs in the nature of *habeas corpus*, *mandamus*, Prohibition, *quo warranto, and certiorari* or any of them for the enforcement of Fundamental Rights conferred by Part III of the Constitution of India. Section 103 of the Constitution of Jammu and Kashmir empowers the State High Court to issue writs, orders, directions etc., *for any purpose other than those* mentioned in Article 32(2A) of the Constitution of India. The combined effect of Section 103 of the Constitution of Kashmir and Article 32(2A) of the Constitution of India is that the High Court of Kashmir has the power to issue writs etc., (a) for the purposes of the enforcement of the Fundamental Rights and (b) for any other purpose.[207]

Article 226 has been amended to remove the bar of territorial jurisdiction though under Section 103 of the State Constitution the territorial bar continues in the un-amended form.[207A]

Whereas the writs under (a) will be issued as a matter of course when the aggrieved party has a fundamental right and that has been infringed, the writ under (b) is an extraordinary and discretionary remedy, and the High Court may refuse to issue a writ "for any other

207 See also, Chapter 6, Fundamental Rights.

207A *Mohan Lal Dhar v. State Bank of India* 1971 Siddhanta 191.

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purpose'' if it is satisfied that there is an adequate alternative remedy.[208] However, as the Allahabad High Court has held, ''this is a rule of discretion for the guidance of the Court and not a limitation on its powers''.[209] In Kashmir, the writs under Section 103, for any other purpose, would be issued only if such other purpose is the enforcement of some legal right or the performance of some legal duty,[210] and if the ordinary process of law provides no satisfactory remedy.

Since both the High Court of Kashmir and the Supreme Court of India, under Article 32(2A) and Article 32(2) respectively have jurisdiction to entertain an application for the issue of the enforcement of Fundamental Rights, the question arises whether a person can apply direct to the Supreme Court without first applying to the High Court. In such a case, the Supreme Court has held [211] that an application under Article 32 lies in the first instance to the Supreme Court, without first resorting to the High Court. If a party has unsuccessfully applied for a writ to the High Court, he can only apply to the Supreme Court by way of appeal. He cannot move the Supreme Court under Article 32(2) as the principle or *res judicata* applies.[212]

The Jammu & Kashmir High Court does not derive its powers to issue prerogative writs from Article 226 only. It can issue writs for purposes other than for enforcing Fundamental Rights by virtue of Section 103 of the State Constitution. These writs can, however, be issued only within the territorial limits of the jurisdiction of the High Court.[212a]

The High Court has power of superintendence over all courts for the time being subject to the appellate or revisional jurisdiction of the High Court.[213] 'Tribunals', however, do not come in this category.[214] The power of superintendence and control includes power to make, consistently with any law in force, general rules of procedure, to prescribe forms for regulating practice and proceedings, to settle fees and to call for returns but the question is whether this power is limited to 'administrative superintendence' or extends to interference with judicial orders of subordinate courts except when such interferference is provided for by statute. The Government of India Act, 1935, expressly excluded such an extension, but there are no such words of

208 *Rashid* v. *Income Tax Investigation Commissioner* 1954, S.C.A. 264 (271)

209 *Budhu* v. *Allahabad Municipality* A.I.R. (1952) All. 753 (760).

210 *State of Orissa* v. *Madan Gopal* (1952) S.C.R.21.

211 *Romesh Thaper* v. *State of Madras* (1950) S.C.R. 594.

212 *Daryao v. State of U.P.* A.I.R. (1961) S.C. 1457.

212a *Isher Das* v. *Income Tax Officer* 1971 JKLR 168.

213 *Constitution of Jammu and Kashmir,* Section 104.

214 See Chapter 7 for discussion and scope of section 104. See also, *Amar Kaur* v. *Kulbir Singh* 1988 JKLR 432, where it was held that the MACT is a Court subordinate to the High Court.

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exclusion in the Constitution of India or the Constitution of Jammu and Kashmir. The view of the Supreme Court of India is that the power extends to "judicial superintendence but should be used sparingly, not to correct errors but to keep subordinate courts within the bounds of their authority.[215] Section 105 makes it obligatory for the High Court to withdraw from the subordinate court all cases which involve questions of law as to the interpretation of the Constitution. In other words, as elsewhere in India, the subordinate Courts have been denied the right to interpret the Constitution; the High Court becomes at the one and the same time the interpretor and guardian of the Constitution. Though it is the duty of the subordinate courts to refer cases involving the interpretation of the Constitution to the High Court, they must do so only if they are satisfied that the case *involves* a substantial question of law as to the interpretation of the Constitution i.e. the case cannot be disposed of without deciding the constitutional point. The decision on this point must be made by the subordinate court but a party aggrieved by it can move the High Court to withdraw the case. The High Court may decline to withdraw a case until the other questions have been determined by the courts below. The provisions of this section will not apply to cases which have already been disposed of. As regards disposal of such cases by the High Court, a distinction is made between (a) cases solely involving Constitutional questions, and (b) those where the Constitutional questions are mixed with the questions of ordinary law.[216] In the former class of cases the High Court will dispose of the case itself and in the latter class of cases the High Court will determine the Constitutional point and return the case to the Court below to determine the case in the ordinary way. This is, of course, a matter of discretion for the High Court and there is nothing to bar the High Court from deciding and disposing of the entire case itself. However, errors of law and fact committed by the subordinate courts cannot be corrected by the High Court in exercise of its jurisdiction under Section 104 of the Constitution of Jammu & Kashmir.[217]

215 *Waryam Singh* v. *Amar Nath* A.I.R. (1954) S.C. 215.
216 *Constitution of Jammu and Kashmir,* Section 105 (a) & (b).
217 *Smt. Gian Devi* v. *Sub Judge, Jammu* 1986 JKLR 560.

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The appointment of the officers and servants of the High Court is made by the Chief Justice of Kashmir,[217a] but the Constitution provides that the Governor may by rule require that the appointments of persons who are not attached to the Courts shall be made after consultations with the *Public Service Commission,*[218] which is responsible for appointment to civil services and civil posts in the State.[219]

There is change on the inscription of the seal of the High Court also. Under the Act 1939, the inscription was "*The seal of the High Court of Judicature, Jammu and Kashmir*" but under the Constitution of 1957, Section 107 provides that the seal shall bear the inscription "*The seal of the High Court of Jammu and Kashmir*". The words 'of Judicature' have been omitted to make the inscription similar to that on the seals of the other High Courts in India.

(iii) Subordinate Courts

The Constitution of Kashmir attempts to divide the subordinate judiciary in two groups:[220]

(1) district judge, additional district judge, assistance district judge, session judge, additional session judge and assistance session judge;

(2) civil judicial posts inferior to the district judge.

Section 109 of the Constitution lays down that no person shall be appointed to a post in the superior group unless he has practised as a pleader for seven years; the appointment is made by the Sadar-i-Riyasat (now the Governor) in 'consultations with the High Court'. Since the Governor is only obliged to *consult* the High Court of the State, it follows that he is not necessarily obliged to accept the recommendations of the High Court. It may however be assumed that the Governor will not ordinarily refuse to accept the views of the High Court. Under the Constitution, the Governor is the authority competent to appoint the District Judges and the power of such appointment does not vest in the High Court. While making such appointment, the Governor has to consult the High Court. Normally,

217a *Constitution of Jammu and Kashmir,* Section 108.
218 *Constitution of Jammu and Kashmir,* proviso to Section 108.
219 *Ibid.,* Section 133 (2) (a).
220 *Ibid.,* Section 112.

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as a matter of rule, the recommendations made by the High Court for the appointment of District Judge should be accepted by the State Governor and the Governor should act on the same. If in any particular case, the State Government for good and weighty reasons finds it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter.[220a] Under Section 110 of the Constitution first appointments to inferior judicial posts are made by the Governor after consulting not only the High Court but also the Public Service Commission of the State and in accordance with the rules made by him in that behalf and it may be assumed that normally the views of the Commission will prevail.

Whereas the power of posting and promotion of district judges and other judicial officers in the superior grade also vests in the Governor,[221] who is obliged to consult the High Court, Section 111 of the Constitution vests the powers of posting, promotion and granting of leave to judicial officers of the inferior grade exclusively in the hands of the State High Court, subject, of course, to such appeals as are allowed by law regulating the conditions of their service. But the control of the High Courts will extend, not only to the courts subordinate to the district court, but also to the district court itself. And the control over the district court includes the control over the district judges.[222] The present section would enable the High Court to take disciplinary action against all subordinate judicial officers.[223] The High Court has the exclusive and absolute control over subordinate judiciary in the matter of disciplinary proceedings. It can initiate disciplinary proceedings against members of the subordinate judiciary including District and Sessions Judges, suspend them pending enquiries and impose punishment on them, other than the punishment of dismissal, removal or reduction in rank.[223a]

The directive provided in the Constitution in Section 13 lays down:

> "The State shall take steps to separate the judiciary from the executive in the public service....,"

and Section 113 of the Constitution is intended to effect that objective by gradual steps. Before the Constitution came into force,

220a *M.M. Gupta* v. *State of Jammu & Kashmir* 1983 (1) SLR (SC), 160.
221 *Constitution of Jammu and Kashmir,* Section 109.
222 Basu, D.D., *Constitution of India,* Vol. II, p. 177.
223 See, *Ghouse* v. *State of Andhra* A.I.R. (1955) Andhra 65.
223a *T.R. Parihar* v. *State of J & K* 1986 JKLR 579.

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the executive exercised control over certain classes of magistrates. The present section lays down that the Governor may, by public notification, bring any class of magistrate under the control of the State High Court and make the provisions of the Constitution regarding appointment, posting, promotion and control of judicial officers already discussed (subject to modifications, if any) applicable to them. This step will go a long way in ensuring the independence of the judiciary in the State. The separation of Judicial and Executive Function Act is a legislation designed to bring to reality the provisions of Section 18 of the Constitution of Jammu and Kashmir.

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9

Conclusion

This treatise has attempted to trace the history of constitutional progress in the State of Jammu and Kashmir, and to explain the factors which induced the State to have a different constitution from the other States in India. Discussion of the Constitution of India has been confined generally to its application to Jammu and Kashmir but the constitution of Jammu and Kashmir has been dealt with more fully.

This last chapter will outline certain general conclusions which seem to follow from the foregoing discussion. Suggestions for possible future development are also set out.

We have seen that economic and constitutional development in Jammu and Kashmir, as in many other princely States of India, commenced later than in the provinces of British India. In the words of Lumby:

> "It can be safely said that the vast majority of the (Princely) States lagged behind British India in both constitutional and administrative development."[1]

It was only in 1931 that there was a general awakening of the people of the State against the feudal system of administration. The entrenchment of autocracy and the corresponding lack of

1 Lumby, E.W.R., *The Transfer of Power in India*, London, 1954, p. 206.

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political freedom were reflected in the lack of the most rudimentary forum for voicing grievances. However, after 1931 the demand for a democratic parliamentary government and for the freedom of press and platform became firm and more persistent. Political parties were born and the struggle continued with enhanced vigour and force. It was this struggle which led to the promulgation, by the Ruler, of the *Jammu and Kashmir Constitution Act, 1939*. Though the promulgation of the Act was a major concession on the part of the Maharaja, it did not pacify the politicians, to whom it seemed inadequate. The struggle continued and in 1946 the National Conference party even demanded that the Maharaja 'Quit Kashmir'.

In 1947 the partition of British India created two independent Dominions of India and Pakistan. Political activities in British India gave an impetus to political activities in Kashmir. The British withdrew from the sub-continent, leaving the rulers of the princely States with the choice of acceding to Pakistan, acceding to India or remaining independent. In Kashmir, the Maharaja found his autocratic government cracking, because of the standing challenge offered to him by the leaders of the National Conference. The Maharaja "disliked the idea of becoming a part of India, which was being democratized, or of Pakistan, which was Muslim...".[2] He was anxious to retain power for as long as he possibly could and so delayed in taking a decision for his State.

> "I wanted to take time to decide to which Dominion I should accede or whether it is not in the best interests of both the Dominions and of my State to stand independent, of course with friendly and cordial relations with both... ."

So wrote the Maharaja to Lord Mountbatten, the Governor-General of India, when requesting accession of his State to the Dominion of India.

Tribesmen from Pakistan territory invaded the State early in October, 1947, and this invasion accelerated the Maharaja's decision regarding accession. Finding himself completely

2 Brown, W.N., *The United States and India and Pakistan*, p. 162.

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isolated and his army locked in deadly combat with the invaders, the Maharaja requested accession of his State to India on October 26, 1947.

The State's accession to India paved the way for the democratisation of its administration. The first step towards democracy was taken on October 30, 1947, when a new Emergency Administration under Sheikh Abdullah, leader of the National Conference, was set up. Sheikh Abdullah was asked by the Maharaja to share the responsibilities of the Government with Shri M.C. Mahajan, then Prime Minister of Kashmir, who later became the Chief Justice of India. The administration however, still worked under the aegis of the Maharaja.

In response to 'public demand' the emergency administration was changed to 'National Interim Government' on March 5, 1948, and Sheikh Abdullah was appointed the first Prime Minister. The advance towards democratisation had finally begun.

We have seen in Chapter 5 that the Constitution of India, adopted in 1950, while giving a special position to Kashmir, envisaged the convening of a Constituent Assembly for the State for the purpose of framing its own constitution.

In 1951, the Regent of Kashmir, Yuvraj Karan Singh, convened a Constituent Assembly for the State, which was also to act as the provisional legislature. The elections to the Assembly were based on universal adult suffrage. One of the very first Acts of the Assembly was to abolish the hereditary rulership of the Maharaja and to substitute in its place an elected Head of the State. By amending the Jammu and Kashmir Constitution Act, 1939, the provisional legislature drew up an 'interim constitution' for the State. Thus, "torn by war and terrorised by fanatical invaders, Kashmir was the first spot on the newly freed Indian sub-Continent to get its own constitutional plan down in black and white".[3]

The Constituent Assembly of the state completed its task of framing a constitution for the State in 1956 and the consti-

3 Bourke-White, Margaret, *Halfway to Freedom*, p. 194. States, other than Kashmir had, by supplementary Instruments of Accession, decided to accept the Constitution of India as a Constitution for those States also.

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tution came into force on January 26, 1957—the Republic day of India.

The Constitution of Jammu and Kashmir is an instrument made up of material borrowed from various sources, but mainly from the Constitution of India. It has borrowed not only the substance but also the language. Nonetheless, it has not been forced on the people of Kashmir; it has been envolved by their own representatives. Like Kashmir handicraft, it is a work which reflects both the simplicity of the Kashmiris and their love for detail.

The Constitution contains matters which concern the state individually; matters which are the common concern of the State and the Union are contained in the Constitution of India in its application to Kashmir i.e. *The Constitution (Application to Jammu and Kashmir) Order, 1954*, and for this reason the Constitution of Kashmir is in fact contained in two different documents.

Analysis of both these documents has revealed that the two constitutions have been so evolved that a clash seems unlikely. Whatever has been entrusted to the Union has been taken away from the sphere of the State and *vice versa*. The residents of Jammu and Kashmir have been given common Indian citizenship, with certain additional privileges to secure their individual character. The individuality of the Kashmiris is secured only in so far as it is compatible with their common Indian nationality.

The constitutional set up in Kashmir is a major political experiment. In India it is unique and it has given the State greater opportunities for progress than exist in the other Indian States:

> "Freedom from the restrictive provisions...(embodied in the Indian Constitution) has enabled the State Government (of Jammu and Kashmir) to embark on schemes of land reforms, which would have been impossible" had the integration "been complete, as in the case of other States".[4]

4 *The Statesman*, Calcutta, April 5, 1952.

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Certain public men in the other Indian States are beginning to realise this. Mr. Punnoose, a representative of the Kerala State in the Lok Sabha said:

> "...If I can make myself audible to the Kashmir people, let me tell them not to accede anything more because I come from a State which suffers bitterly as a result of having acceded all and sundry to the Indian Constitution."[5]

Why was Mr. Punnoose so bitter?

> "To say that there is a popular ministry in our states" he added, "or any of these states is a mockery. These ministries are filled with the Yes men of the Centre with the result (that) the ministers never look to the people but to the Centre—they are more interested in pleasing the people at the Centre."[5]

There may be some truth in these harsh allegations. The provisions of the Indian Constitution for parliamentary government in the other States were intended to safeguard political democracy; the Constitution of Kashmir has the same objective.

But the Constitution of Jammu and Kashmir is not perfect; no constitution is perfect for that matter. Certain provisions of the Constitution of Jammu and Kashmir require reconsideration. Chief among these are: section 3—"The State of Jammu and Kashmir is and shall be an integral part of the Union of India", section 147 which puts section 3 beyond the powers of the legislature to amend and section 35 (2) which provides that the Governor will discharge his functions except those mentioned in sections 36, 38 and 92, *only* on the advice of the Council of Ministers. The rigidity of these provisions may affect the harmonious working of the Constitution and lead to some unfortunate hardships. By providing that "The State of Jammu and Kashmir is and shall be an integral part of India", the Con-

5 *Parliamentary Debates*, Lok Sabha, Vol. II, No. 2, 1952, p. 2547. A similar view was expressed by Mr. C.R. Iyyunnal, M.P., see *Ibid.*, p. 2549.

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stitution has by implication put a restriction on the exercise of sovereignty by the Union of India. The cession of territory is a possibility which must be recognised. While no State should be required to make provisions in its organic law for its own termination, it must also be recognised that the rigidity of the provisions mentioned above may create a difficult situation. To take an hypothetical example, what would happen if the future Government of India refused to continue to treat Kashmir as a part of India? The State cannot force India to keep on treating it as an integral part of India. And such a situation will arise if India is obliged to cede some of her territory, and that unfortunately happens to be Kashmir.

Again some provisions in part IV of the Constitution of Jammu and Kashmir, the Directive Principles, are illusory and largely meaningless. Flagrant examples of these are: 'The State shall strive to secure to all its children a right to happy childhood...'[6] and 'The State shall endeavour to secure to all women...the right to reasonable maintenance, extending to cases of married women who have been divorced or abandoned...'.[7]

Furthermore, in the application of the Fundamental Rights to the State, restrictions not applicable elsewhere in India have been imposed, denying the enjoyment of some Fundamental Rights to the people of Kashmir. These restrictions will have to be scrutinized and their necessity re-examined, for they give a long whip to the State Executive even though from time to time restrictions have been diluted to a large extent.

Although the Constitution provides sufficient safeguards for the conduct of free and fair democratic elections under the superintendence, direction and control of the election commissioner appointed directly by the Governor, there are some provisions of the election law which need looking into.

The Jammu and Kashmir People's Representation Act, 1957, provides for the delimitation of the constituencies for the purposes of elections to the Legislative Assembly and Legislative Council in the State. Section 3 of the Act empowers the Governor to determine the constituencies into which the State shall be divided, the extent of each constituency and the number of seats

6 *Constitution of Jammu and Kashmir*, Section 21.
7 *Ibid.*, Section 22.

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allotted to each constituency. Section 7 of the Act provides that all such Orders of the Governor are subject to such modifications as the legislature may make. This in actual effect gives the control of the delimitation of the constituencies to the ruling party through the legislature. This provision is hardly an acceptable one. In the rest of India, a Commission is appointed under the Delimitation Commission Act, 1952, to determine the constituencies. And thus in the rest of India interference by the political parties for their own advantage is excluded*

Another matter in the Election law of the State which demands reconsideration is the provision regarding the elections to the State Legislative Council. Whereas in Kashmir the three constituencies from which the members are elected consist of the local authorities, teachers and panchayats, in the other states of India, they consist of local authorities, teachers and graduates. Since the members of the panchayats in Kashmir are usually the nominees of the ruling party, the democratic principles which the constitution wishes to secure, might be better assured by substituting a graduate constituency for the panchayats.

The experiment in Jammu and Kashmir (granting limited internal autonomy) is the first of its kind in the Indo-Pak Sub-Continent. It needs to be given a fair opportunity to justify itself. If found successful it may be possible to extend it to other states in keeping with the true spirit of a Federation.

Keeping in tune with the position in the rest of the country, the first Delimitation Commission was constituted in the State of Jammu & Kashmir under the Chairmanship of the former Chief Justice of the Jammu & Kashmir High Court Wazir Janki Nath.

The next Delimitation Commission was (under the Representation of People Act, 1957) headed by Mian Jalalludin, the retired Chief Justice of Jammu & Kashmir. The Election Commission of India has one of its representatives as a member of the Delimitation Commission of the State. Thus, the Executive interference through the Legislature in the matter of Delimitation of constituencies in Jammu & Kashmir State has also been minimised and the determination of constituencies and their delimitation has been entrusted to an independent Statutory Delimitation Commission.

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APPENDICES

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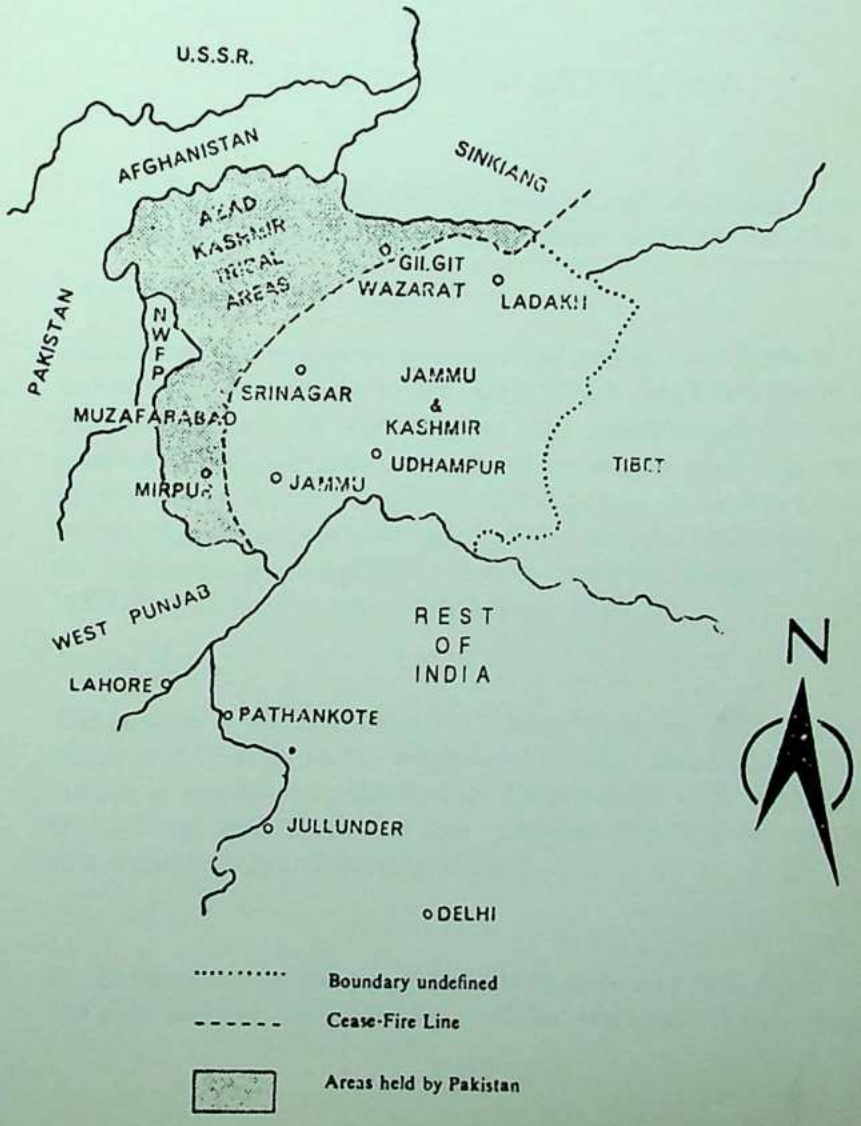
Appendix I

SKETCH MAP OF JAMMU AND KASHMIR STATE



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Appendix II

TREATY OF AMRITSAR, 1846

"Treaty Between the British Government and Maharaja Gulab Singh of Jummoo". Done at Umritsar, 16th March, 1846

"*Article I*

The British Government transfers and makes over forever, in independent possession, to Maharaja Golab Singh and the heirs male of his body, all the hilly or the mountainous country, situated to the eastwards of the River Indus and the westward of the River Ravee, including Chamb and excluding Lahul, being part of the territories ceded to the British Government by the Lahore State, according to the provisions of Article IV, of the Treaty of Lahore, dated 9th March, 1846.

Article II

The Eastern boundary of the tract transferred by the foregoing article to Maharaja Golab Singh shall be laid down by the Commissioner appointed by the British Government and Maharaja Golab Singh respectively for that purpose, and shall be defined in a separate engagement after survey.

Article III

In consideration of the transfer made to him and his heirs by the provisions of the foregoing Articles, Maharaja Golab Singh

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will pay to the British Government the sum of Rupees (nanukshahee) fifty lakhs to be paid on ratification of this treaty and twenty-five lakhs on or before the first October of the current year, A.D. 1846.

Article IV

The limits of the territories of Maharaja Golab Singh shall not be at any time changed without the concurrence of the British Government.

Article V

Maharaja Golab Singh will refer to the arbitration of the British Government any disputes or questions that may arise between himself and the Government of Lahore or any other neighbouring State, and will abide by the decision of the British Government.

Article VI

Maharaja Golab Singh engages for himself and heirs to join, with the whole of Military force, the British troops, when employed within the hills or in the territories adjoining his possessions.

Article VII

Maharaja Golab Singh engages never to take or retain in his service, any British subject, nor the subject of any European or American State, without the consent of the British Government.

Article VIII

Maharaja Golab Singh engages to respect, in regard to the territory transferred to him, the provisions of Articles V, VI and VII of the separate engagement between the British Government and the Lahore Durbar, dated March 11, 1846.

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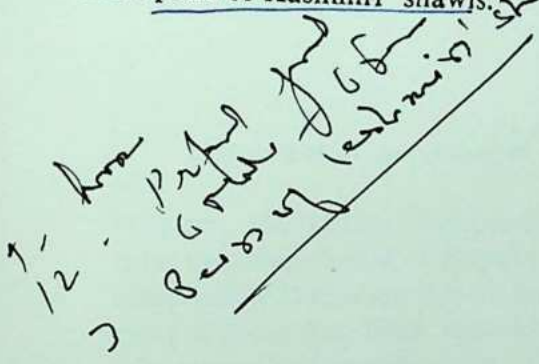
Article IX

The British Government will give its aid to Maharaja Golab Singh in protecting his territories from external enemies.

Article X

Maharaja Golab Singh acknowledges the supremacy of the British Government, and will in token of such supremacy present annually to the British Government one horse, twelve perfect shawl goats of approved breed (six male and six female), and three pairs of Kashmiri shawls.



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Appendix III

Instrument of Accession of Jammu and Kashmir State

Whereas, the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act, 1935, shall with such omissions, additions, adaptations and modifications as the Governor-General may by order specify, be applicable to the Dominion of India;

And whereas the Government of India Act, 1935, as so adapted by the Governor-General provides that an India State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof;

Now, therefore, I Shriman Indar Mahandar Rajrajeshwar Maharajadhiraj Shri Hari Singhji Jammu Kashmir Naresh Tatha Tibbet adi Deshadhipathi Ruler of JAMMU AND KASHMIR State in the exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession and—

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes of

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the Dominion, exercise in relation to the State of Jammu and Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the 15th day of August 1947 (which Act as so in force is hereinafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by an Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorising the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purpose of a Dominion Law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.

8. Nothing in this Instrument affects the continuance of my

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sovereignty in and over this State, or save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October Nineteen Hundred and Forty-Seven.

(Sd.) HARI SINGH

Maharajadhiraj of Jammu and Kashmir State.

I do hereby accept this Instrument of Accession.

Dated this twenty-seventh day of October Nineteen Hundred and Forty-Seven.

(Sd.) MOUNTBATTEN OF BURMA
(Governor-General of India).

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Appendix IV

THE CONSTITUTION OF JAMMU AND KASHMIR

Preamble — We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves—

JUSTICE, social, economic and political;

LIBERTY, of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among us all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this seventeenth day of November, 1956, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

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PART I

PRELIMINARY

1. **Short title and Commencement.** — (1) This Constitution may be called the Constitution of Jammu and Kashmir.

(2) This section and sections 2,3,4,5,6,7,8 and 158 shall come into force at once and the remaining provisions of the Constitution shall come into force on the twenty-sixth day of January, 1957, which day is referred to in this Constitution as the commencement of this Constitution.

2. **Definitions.**—(1) In this Constitution, unless the context otherwise requires,—

(a) "Constitution of India" means the Constitution of India as applicable in relation to this State;

(b) "Existing Law" means any law, ordinance, order, bye-law, rule, notification or regulation passed, made or issued before the commencement of this Constitution by the Legislature or other competent authority or person having power to pass, make or issue such law, ordinance, order, bye-law, rule, notification or regulation;

(c) "Part" means a part of this Constitution;

(d) "Schedule" means a Schedule of this Constitution; and

(e) "Taxation" includes the imposition of any tax or impost, whether general or local or special, "Tax" shall be construed accordingly.

(2) Any reference in this Constitution to Acts or laws of the State Legislature shall be construed as including a reference to an Ordinance made by the [1][Governor].

[2][(3) Any reference in this Constitution to the Sadar-i-Riyasat shall, unless the context otherwise requires, be construed as a reference to the Governor.]

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1. Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1955, s. 2.

2. Ins. by s. 3, *ibid.*

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PART II

THE STATE

3. Relationship of the State with the Union of India.— The State of Jammu and Kashmir is and shall be an integral part of the Union of India.

4. Territory of the State.— The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.

5. Extent of Executive and legislative power of the State.— The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.

PART III

PERMANENT RESIDENTS

6. Permanent residents.—(1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of may, 1954:—

(a) he was a State Subject of Class I or the Class II; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to the date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as the [State Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932.]

7. Construction of references to State Subjects in existing laws.— Unless the context otherwise requires, all references in any

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existing law of hereditary State Subjects or to State Subject of Class I or of Class II or of Class III shall be construed as references to permanent residents of the State.

8. Legislature to define permanent residents.—Nothing in the foregoing provisions of this part shall derogate from the power of the State Legislature to make any law defining the classes of persons who are, or shall be, permanent residents of the State.

9. Special provision for Bill relating to permanent residents.— A Bill making provision for any of the following matters, namely:—

(a) defining or altering the definition of the classes of persons who are or shall be, permanent residents of the State;
(b) conferring on permanent residents any special rights or privileges;
(c) regulating or modifying any special rights or privileges enjoyed by permanent residents,

shall be deemed to be passed by either House of the Legislature only if it is passed by a majority of not less than two-thirds of the total membership of that House.

10. Rights of the permanent residents.— The permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

11. Definition.— In this Part, unless the context otherwise requires, the State includes the Government and the Legislature of the State and all local or other authorities within the territory of the State or under the control of the Government of the State.

12. Application of the principles contained in this Part.—The provisions contained in its Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the State and it shall be the duty of the State to apply these principles in making laws.

13. State to establish a socialist order of society for the promotion of welfare of the people.— The prime object of the State consistent with the ideals and objective of the freedom movement

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envisaged in "New Kashmir" shall be the promotion of the welfare of the mass of the people by establishing and preserving a socialist order of society wherein all exploitation of man has been abolished and society wherein justice — social, economic and political — shall inform all the institutions of national life.

14. Economy of the State to be developed in a planned manner.— Consistently with the objectives outlined in the foregoing section, the State shall develop in a planned manner the productive forces of the country with a view to enriching the material and cultural life of the people and foster and protect—

(a) the public sector where the means of production are owned by the State;

(b) the co-operative sector where the means of production are co-operatively owned by individuals or groups of individuals; and

(c) the private sector where the means of production are owned by an individual or a corporation employing labour; provided that the operation of this sector is not allowed to result in the concentration of wealth or of the means of production to the common detriment.

15. State to ensure speedy improvement in standard of living of rural masses.— The State shall endeavour to organise and develop agriculture and animal husbandry by bringing to the aid of the cultivator the benefits of modern and scientific research and techniques so as to ensure a speedy improvement in the standard of living as also the prosperity of the rural masses.

16. Organisation of village Panchayats.— The State shall take steps to organise village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

17. State to take certain steps for promoting crafts and cottage industries.— The State shall in order to rehabilitate, guide and promote the renowned crafts and cottage industries of the State, initiate and execute well considered programmes for refining and modernising techniques and modes of production, including the employment of cheap power so that unnecessary drudgery and toil of the workers are eliminated and the artistic value of the products enhanced, while the fullest scope is provided for the encouragement and development of individual talent and initiative.

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18. Separation of judiciary from executive.— The State shall take steps to separate the judiciary from the executive in the public services, and shall seek to secure a judicial system which is humane, cheap, certain objective and impartial whereby justice shall be done and shall be seen to be done and shall further strive to ensure efficiency, impartiality and incorruptibility of its various organs of justice, administration and public utility.

19. Right to work and to public assistance in certain cases.— The State shall within the limits of its economic capacity and development, make effective provision for securing—

(a) that all permanent residents, men and women equally, have the right to work, that is the right to receive guaranteed work with payment for labour in accordance with its quantity and quality subject to a basic minimum and maximum wage established by law;

(b) that the health and strength of workers, men and women and the tender-age of children are not abused and that permanent residents are not forced by economic necessity to enter avocations unsuited to their sex, age or strength;

(c) that all workers, agricultural, industrial or otherwise, have reasonable just and humane conditions of work with full enjoyment of leisure and social and cultural opportunities;

(d) that all permanent residents have adequate maintenance in old age as well as in the event of sickness, disablement, unemployment and other cases of undeserved want by providing social insurance, medical aid, hospitals, sanatoria and health resorts at State expense.

20. Rights of free and compulsory education in certain cases.— The State shall endeavour—

(a) to secure to every permanent resident the right to free education up to the University standard;

(b) to provide, within a period of ten years from the commencement of this Constitution, compulsory education for all children until they complete the age of fourteen years; and

(c) to ensure to all workers and employees adequate facilities for adult education and part-time technical, professional and vocational courses.

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21. Rights of children.— The State shall strive to secure—

(a) to all children the right to happy childhood with adequate medical care and attention; and

(b) to all children and youth equal opportunities in education and employment, protection against exploitation and against moral or material abandonment.

22. Rights of women.— The State shall endeavour to secure to all women—

(a) the right to equal pay for equal work;

(b) the right to maternity benefits as well as adequate medical care in all employments;

(c) the right to reasonable maintenance, extending to cases of married women who have been divorced or abandoned;

(d) the right to full equality in all social, educational, political and legal matters;

(e) special protection against discourtesy, defamation, hooliganism and other forms of misconduct.

23. Protection of educational, material and cultural interests of socially and economically backward sections.— The State shall guarantee to the socially and educationally backward sections of the people special care in the promotion of their educational, material and cultural interests and protection against social injustice.

24. Duty of the State to improve public health. — The State shall make every effort to safeguard and promote the health of the people by advancing public hygiene and by prevention of disease through sanitation, pest and vermin control, propaganda and other measures, and by ensuring widespread, efficient and free medical services throughout the State and, with particular emphasis, in its remote and backward regions.

25. Duty of the State to foster equality and secularism.— The State shall combat ignorance, superstition, fanaticism, communalism, racialism, cultural backwardness and shall seek to foster brotherhood and equality among all communities under the aegis of a Secular State.

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PART V

THE EXECUTIVE

The *Governor*

26. Head of State.— (1) The Head of the State be designated as the *Governor.

(2) The executive power of the State shall be vested in the *Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(3) Nothing in this section shall—

(a) be deemed to transfer to the *Governor any functions conferred by any existing law on any other authority; or

(b) prevent the State Legislature from conferring by law functions on any authority subordinate to the *Governor.

[1][**27. Appointment of Governor.**— The Governor shall be appointed by the President by warrant under his hand and seal.

Provided that the person holding office as Sadar-i-Riyasat immediately before the commencement of the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, shall on such commencement be the Governor and shall, subject to the other provisions of this Constitution, continue to hold office as Governor until the remaining period of his term for which he was elected as Sadar-i-Riyasat expires.]

28. Term of Office.— (1) The *Governor shall hold office during the pleasure of the President.

(2) The *Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this section, the *Governor shall hold office for a term of five years from the date on which he enters upon his office :

Provided that he shall, notwithstanding the expiration of his term continue to hold office until his successor enters upon his office.

[2][**29. Qualifications for appointment as Governor.**— No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty years.]

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 s. 2.

1. Subs. by s. 4 *ibid.*
2. Subs. by s. 5 *ibid.*

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30. Conditions of Office.— (1) The *Governor shall not be a member of either House of Legislature and if a member of either House be [1][appointed] as *Governor, he shall be deemed to have vacated his seat in the House on the date on which he enters upon his office as *Governor.

(2) The *Governor shall not hold any other office of profit.

(3) The *Governor shall be entitled to such emoluments, allowances and privileges as are specified in the Second Schedule.

(4) The emoluments and allowances of the *Governor shall not be diminished during his term of office.

[2] **[31. Oath of Office.**— The Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court or, in his absence, the senior most Judge of that Court available on oath or affirmation in the following form, that is to say-

'I, A. B. do swear in the name of God/solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of Jammu and Kashmir and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of the State.']

[3]32. Omitted.

[4]**[33. Discharge of the functions of the Governor in certain contingencies.**— The President may make such provision as he thinks fit for the discharge of functions of the Governor in any contingency not provided for in this Part.]

34. Power to grant pardons, reprieves, etc.— The *Governor shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. for "elected and recognised" by s. 6, *ibid.*
2. Subs. by s. 7, *ibid.*
3. S. 32 omitted by s. 8, *ibid.*
4. Subs. by s. 9, *ibid.*

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The Council of Ministers

35. Council of Ministers to aid and advise the *Governor.— (1) There shall be a Council of Ministers with [1][Chief Minister] at the head to aid and advise the *Governor in the exercise of his functions.

(2) All functions of the *Governor except those under sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers.

(3) The question whether any, and if so what, advice was tendered by Ministers to the *Governor shall not be inquired into any court.

36. Appointment of Ministers.— The [1][Chief Minister] shall be appointed by the *Governor and the other Ministers shall be appointed by the *Governor on the advice of the [1][Chief Minister].

37. Minister's responsibility to the Legislature.— (1) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

(2) A Minister who for any period of six consecutive months is not a member of either House of Legislature shall upon the expiry of that period cease to be a Minister.

38. Deputy Ministers.— The *Governor may on the advice of the [1][Chief Minister] appoint from amongst the members of either House of Legislature such number of Deputy Ministers as may be necessary.

39. Tenure of Office.— The Ministers and the Deputy Ministers shall hold office during the pleasure of the *Governor.

40. Oaths of Office and Secrecy.— Before a Minister or a Deputy Minister enters upon his office, the *Governor or, in his absence, any person authorised by him, shall administer to the Minister or the Deputy Minister the oaths of office and of secrecy according to the form set out for the purpose in the Fifth Schedule.

41. Salaries and allowances of Ministers and Deputy Ministers.— The salaries and allowances of Ministers and Deputy Ministers shall be such as the Legislature may from time to time by law determine and, until so determined, shall be such as are payable respectively to the Ministers and the Deputy Ministers under the Jammu and Kashmir

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. for "Prime Minister" by s. 2, *ibid.*

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Ministers' Salaries Act, 1956 (Act VI of 1956), the Jammu and Kashmir Ministers' Travelling Allowances Rules for the time being in force, and the Jammu and Kashmir Deputy Minister Salaries and Allowances Act, S. 2010 (Act VIII S.2010).

The Advocate General

42. Advocate General for the State.—(1) The *Governor shall appoint a person who is qualified to be appointed a Judge of the High Court, to be Advocate General for the State.

(2) It shall be the duty of the Advocate General to give advice to the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Government, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties, the Advocate General shall have the right of audience in all courts in the State.

(4) The Advocate General shall hold office during the pleasure of the *Governor and receive such remuneration as the *Governor may determine.

Conduct of Government Business

43. Rules of Business.— The *Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business.

44. Duties of [1][Chief Minister].— It shall be the duty of the [1][Chief Minister]-

(a) to communicate to the *Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the *Governor may call for; and

(c) if the *Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1 Subs. for "Prime Minister" by s. 2, *ibid.*

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45. Form of orders and instruments and their authentication.— (1) All executive action of the Government shall be expressed to be taken in the name of the *Governor or of the Government of Jammu and Kashmir.

(2) Orders and other instruments made and executed in the name of the *Governor or of the Government of Jammu and Kashmir shall be authenticated in such manner as may be specified in the rules to be made by the *Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the *Governor or, as the case may be, by the Government of Jammu and Kashmir.

PART VI

THE STATE LEGISLATURE

Composition of the State Legislature

46. Legislature for the State.— There shall be a Legislature for the State which shall consist of the *Governor and two Houses to be known respectively as the Legislative Assembly and the Legislative Council.

47. Composition of Legislative Assembly.— (1) The Legislative Assembly shall consist of [1][One hundred and eleven] members chosen by direct election from territorial constituencies in the State:

Provided that the *Governor may of he is if opinion that women are not adequately represented in the Assembly, nominate not more than two women to be members thereof.

[2][(2) For the purposes of sub-section (1), the State shall be divided into single member territorial constituencies by such authority and in such manner as the Legislature may by law determine.]

(3) Upon the completion of each census, the number, extent and boundaries of the territorial constituencies shall be readjusted by such authority and in such manner as the Legislature may by law determine:

Provided that such readjustment shall not effect representation in the Legislative Assembly until the dissolution of the then existing Assembly.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. by Constitution of Jammu and Kashmir (Twentieth Amendment) Act, 1987.
2. Sub-section (2) subs. by the Constitution of Jammu and Kashmir (Twelfth Amendment) Act, 1975, w.e.f. 17-9-1975.

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48. Provision relating to Pakistan occupied territory.— Notwithstanding anything contained in section 47, until the area of the State under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives-

(a) [1][twenty-four seats] in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly; and

(b) the said area shall be excluded in delimiting the territorial Constituencies under section 47.

[2]**[48-A. Holding of general election in the event of earlier dissolution of Legislative Assembly.** — Notwithstanding anything contained in this Constitution if upon the completion of a census, but before the final re-adjustment of territorial constituencies, the Legislative Assembly is dissolved prior to the expiry of its duration and the Governor is satisfied that holding of general election without delay is necessary, he may after consulting the Election Commission, by notification direct that the general election shall be held on the basis of the last preceding delimitation of territorial constituencies.]

49. Reservation of seats for Scheduled Castes.— (1) There shall be reserved in the Legislative Assembly for the Scheduled Castes in the State a number of seats which shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes bears to the population of the State.

Explanation.—In this sub-section-

[3][(a) the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published; and]

(b) "Scheduled Castes" means the castes, races or tribes or part of, or groups within, castes, races or tribes which are for the purposes of the Constitution of India deemed to be Scheduled Castes in relation to the State under the provisions of Article 341 of that Constitution.

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1. Subs. by the Constitution of Jammu and Kashmir (Twelfth Amendment) Act, 1975, w. e. f. 17-9-1975.
2. S. 48-A ins. *vide ibid.*
3. Clause (a) subs. by Constitution of Jammu and Kashmir (Twelfth Amendment) Act, 1975, w.e.f. 17-9-1975, s. 5.

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(2) The provisions of sub-section (1) shall cease to have effect on the expiration of a period of [1][forty-three years] from the commencement of this Constitution:

Provided that such cesser shall not effect any representation in the Legislative Assembly until the dissolution of the then existing Assembly.

50. Composition of Legislative Council.— (1) Legislative Council shall consist of thirty-six members, chosen in the manner provided in the section.

(2) Eleven members shall be elected by the members of the Legislative Assembly from amongst persons who are residents of the Province of Kashmir and are not members of the Legislative Assembly:

Provided that of members so elected, at least one shall be a resident of Tehsil Ladakh and at least one shall be a resident of Tehsil Kargil.

(3) Eleven members shall be elected by the members of the Legislative Assembly from amongst persons who are residents of the Province of Jammu and are not members of the Legislative Assembly:

Provided that of the members so elected, at least one shall be a resident of Doda District and at least one shall be a resident of Poonch District.

(4) One member shall be elected by each of the following electorates, namely:-

(a) the members of municipal council, town area committees and notified area committees in the Province of Kashmir;

(b) the members of municipal council, town area committees and notified area committees in the Province of Jammu;

[2]xxx

(5) Two members shall be elected by each of the following electorates, namely:-

(a) the members of the Panchayats and such other local bodies in the Province of Kashmir as the *Governor may by order specify;

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1. Subs. by the Constitution of Jammu and Kashmir (Twenty-second Amendment) Act, 1989, for "thirty-three years".

2. Clauses (c) and (d) of sub-section (4) of section 50 omitted by the Constitution of Jammu and Kashmir (Fifth Amendment) Act, 1963, s. 2.

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(b) the members of the Panchayats and such other local bodies in the Province of Jammu as the *Governor may by order specify.

(6) [1][Eight] members shall be nominated by the *Governor, not more than three of whom shall be persons belonging to any of the socially or economically backward classes in the State, and the others shall be persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service.

(7) Elections under sub-sections (2) and (3) shall be held in accordance with the system of proportional representation by means of the single transferable vote.

General Provision

51. Qualifications for membership of the Legislature.— A person shall not be qualified to be chosen to fill a seat in the Legislature unless he-

[2][(a) is a permanent resident of the State, and makes and subscribes before some person authorised in that behalf by the Election Commission of India an oath or affirmation according to the form set out for the purpose in the Fifth Schedule;]

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age, and in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Legislature.

52. Duration of Legislature.— (1) The Legislative Assembly, unless sooner dissolved, shall continue for [3][six years] from the date appointed for its first meeting and no longer and the expiration of the said period of [1][six years] shall operate as a dissolution of the Assembly:

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. by s. 2, *ibid.*
2. Subs. by s. 10, *ibid.*
3. Subs. by Constitution of Jammu and Kashmir (Sixteenth Amendment) Act, 1977.

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Provided that the said period may, while a Proclamation of Emergency issued under article 352 of the Constitution of India is in operation, be extended by the State Legislature by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council shall not be subject to dissolution but as nearly as possible one-third of the members thereof shall retire as soon as may be, on the expiration of every second year in accordance with the provisions made in that behalf by Legislature by law.

53. Session of the Legislature, prorogation and dissolution. — (1) The *Governor shall from time to time summon each House of the Legislature to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The *Governor may from time to time-

(a) prorogue the Houses or either House;

(b) dissolve the Legislative Assembly.

54. Rights of Governor to address and send message to the House or Houses.— (1) The *Governor may address either House of Legislature, or both Houses assembled together, and may for that purpose require the attendance of members.

(2) The *Governor may send messages to either House, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

55. Special address by the Governor.— (1) At the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year, the *Governor shall address both Houses of Legislature assembled together and inform the Legislature of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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56. Rights of Ministers and Advocate General as respects the Houses.— Every Ministers and the Advocate General shall have the right to speak in, and otherwise to take part in the proceedings of, both Houses and to speak in, and otherwise to take part in the proceedings of, any Committee of the Legislature of which he may be named a member, but shall not, by virtue of this section, be entitled to vote.

Officers of the State Legislature

57. The Speaker and Deputy Speaker of the Legislative Assembly.— The Legislative Assembly shall, as soon as may be choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member, to be Speaker or Deputy Speaker, as the case may be.

58. Vacation and resignation of, and removal from, the offices of the Speaker and Deputy Speaker.— A member holding office as Speaker or Deputy Speaker of the Legislative Assembly-

(a) shall vacate his office if he ceases to be a member of the Assembly;

(b) may at any time by writing under his hand addressed if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days notice has been given of the intention to move the resolution:

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

59. Power of the Deputy Speaker or other person to perform the duties of the office of or to act as Speaker.— (1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or if the office of the Deputy Speaker is also vacant, by such member of the Assembly as the *Governor may appoint for the purpose.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

60. The Speaker and the Deputy Speaker not to preside while a resolution for his removal from office is under consideration.— (1) At any sitting of the Legislative Assembly, while any resolution, for the removal of the Speaker from his office is under consideration, the Speaker or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of sub-section (2) of section 59 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in section 67, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

61.The Chairman and Deputy Chairman of the Legislative Council.— (1) The Legislative Council shall, as soon as may be, choose two Members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chairman or Deputy Chairman, as the case may be.

(2) The provisions of sections 58, 59 and 60 shall apply in relation to the Chairman and Deputy Chairman of the Legislative Council with the substitution of the words "Chairman" and "Council" for the words "Speaker" and "Assembly" respectively, wherever they occur in those provisions, and with the omission of the further proviso to section 58.

62. Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman.— There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly and to the Chairman and the Deputy Chairman of the

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* Subs. for "Sadar-i-Riyasat" by the constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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Legislative Council, such salaries and allowances as may be respectively fixed by Legislature by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Third Schedule.

63. Secretariat of the Legislature.— (1) Each House of the Legislature shall have a separate secretariat staff :

Provided that nothing in this sub-section shall be construed as preventing the creation of posts common to both Houses.

(2) The Legislature may by law regulate the recruitment and the conditions of service of persons appointed, to the secretarial staff of each House.

(3) Until provision is made by the Legislature under sub-section (2), the *Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said sub-section.

Conduct of Business

64. Oath or affirmation by members.— Every member of the Legislative Assembly or the Legislative Council shall, before taking his seat, make and subscribe before the *Governor or some person appointed in that behalf by him an oath or affirmation according to the form set out for the purpose in the Fifth Schedule.

65. Quorum.— Save as otherwise provided by the rules of procedure of the House, the quorum to constitute a meeting of the Legislative Assembly and of the Legislative Council shall be twenty and ten respectively.

66. Power of Houses to act notwithstanding vacancies.— A House of the Legislature shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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67. Voting in the Houses.— (1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.

(2) The Speaker or Chairman or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

Disqualifications of Members

68. Vacation of Seats.— (1) No person shall be a member of both Houses of the Legislature and provision shall be made by Legislature by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

[1][(2) If a member of a House of the Legislature resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant:

Provided that if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.]

(3) If for a period of sixty days a member of a House of the Legislature is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of-

(a) such absence caused by reason beyond his control; or

(b) any period during which the House is prorogued or is adjourned for more than four consecutive days.

69. Disqualifications for membership.— (1) A person shall be disqualified for being chosen and for being, a member of the Legislative Assembly or Legislative Council-

(a) if he holds any office of profit under the Government of India or the State Government or any other State Govern-

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1. Subs. *vide* Constitution of Jammu and Kashmir (Fourteenth Amendment) Act, 1976 s. 2.

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ment within the Union of India, other than an office declared by Legislature by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a permanent resident of the State or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance of adherence to a foreign State;

(e) if he is so disqualified by or under any law made by the Legislature.

(2) For the purposes of this section (1), a person shall not be deemed to hold an office of profit under the Government of India, the State Government or any other State Government within the Union of India, by reason only that he is a Minister, or a Deputy Minister.

[1][(3) A person shall be disqualified for being a member of either House of Legislature if he is so disqualified under the Seventh Schedule.]

70. Decision on questions as to disqualifications of members.— (1) If it is represented to the Speaker or the Chairman that a member of the Legislative Assembly or, as the case may be, of the Legislative Council is disqualified for being such a member under the provisions of [2][Sub-section (1) of section 69], or was so disqualified at any time since being chosen as a member, and the member does not admit that he is or was so disqualified, the question shall be referred to the High Court for decision and its decision shall be final :

Provided that where the disqualification in question arises from circumstances which subsisted at the time of his being chosen as such member, no such representation as aforesaid shall be entertained-

(a) unless it is made after the expiration of the period prescribed by law for presenting an election petition calling in question the election of the member, and

(b) if such an election petition is pending or has been tried, unless the Speaker or Chairman, as the case may be, is satisfied that the question of the member's disqualification by reason of those circumstances has not been raised or, as the case may be, was not raised, in the proceedings on the election petition.

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1. Subs. by Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987.
2. Ins. by *ibid.*

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(2) Where on a representation made under sub-section (1) the member admits that he is or was disqualified under the provisions of [1][Sub-section (1) of section 69], or where on a reference made under that sub-section the High Court decided that the member is or was so disqualified, his seat shall thereupon become vacant.

71. Penalty for sitting and voting before making oath or affirmation when not qualified or when disqualified.— If a person sits or votes as a member of the Legislative Assembly or the Legislative Council before he has complied with the requirements of section 64 or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by the Legislature, he shall be liable in respect of each day on which he so sits or votes to a penalty of one hundred rupees to be recovered as a debt due to the state.

Powers, Privileges and immunities of the State Legislature and its Members

72. Powers, Privileges, etc. of the Houses of Legislature and of the members and committees thereof.— (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature.

(2) No member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of a House of the Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature and of the members and the committees of a House of the Legislature shall be such as may from time to time be defined by Legislature by law, and until so defined, shall be those of the Parliament of India and of its members and committees.

(4) The provisions of sub-sections (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature or any Committee thereof as they apply in relation to members of that Legislature.

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1. Subs. by Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987.

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73. Salaries and allowances of members.— Members of the Legislative Assembly and the Legislative Council shall be entitled to receive such salaries and allowances as may from time to time be determined by Legislature by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly.

Legislative Procedure

74. Provision as to introduction and passing of Bills.— (1) Subject to the provisions of sections 76 and 84 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature.

(2) Subject to the provisions of sections 75 and 76 a Bill shall not be deemed to have been passed by the Legislature unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

75. Restriction on powers of Legislative Council as to Bills other than Money Bills.— (1) If after a Bill has been passed by the Legislative Assembly and transmitted to the Legislative Council-

(a) the Bill is rejected by the Council; or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the

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Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council-

(a) the Bill is rejected by the Council; or

(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree,

the Bill shall be deemed to have been passed by the Houses of the Legislature in the form in which it was passed by the Legislative Assembly for the second time with such amendments if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this section shall apply to a Money Bill.

76. Special Procedure in respect of Money Bills.— (1) A Money Bill shall not be introduced in the Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly, it shall be transmitted to the Legislative Council for its recommendations and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the

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expiration of the said period in the form in which it was passed by the Legislative Assembly.

77. Definition of "Money Bills".— (1) For the purposes of this Part, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:-

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;

(c) the custody of the Consolidated Fund or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of the State;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money; or

(g) any matter incidental to any of the matters specified in clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alternation or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill introduced in the Legislature is a Money Bill or not, the decision of the Speaker of the Legislative Assembly thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under section 76 and when it is presented to the *Governor for assent under section 78, the certificate

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

78. Assent to Bills.— When a Bill has been passed by both Houses of the Legislature, it shall be presented to the *Governor and the *Governor shall declare either that he assents to the Bill or that he withholds assent therefrom :

Provided that the *Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Houses shall reconsider the Bill accordingly and if the Bill is passed again by the Houses with or without amendment and presented to the *Governor for assent, the *Governor shall not withhold assent therefrom.

Procedure in Financial Matters

79. Annual Financial Statement.— (1) The *Governor shall in respect of every financial year cause to be laid before both Houses of the Legislature a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately:-

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State,

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of the State-

(a) the emoluments and allowances of the *Governor and other expenditure relating to his office;

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and of the Chairman and the Deputy Chairman of the Legislative Council;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of the loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of the Judges of the High Court;

(e) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(f) any other expenditure declared by this Constitution, or by Legislature by law, to be so charged.

80. Procedure in Legislature with respect to estimates.— (1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of the State shall not be submitted to the vote of the Legislative Assembly, but nothing in this sub-section shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly and the Legislative Assembly shall have power to assent or to refuse to assent; to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the *Governor.

81. Appropriation Bills.— (1) As soon as may be after the grants under section 80 have been made by the Assembly, three shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet-

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the Houses.

(2) No amendment shall be proposed to any such Bill in either House of the Legislature which will have the effect of varying the amount or altering the destination of any grant so made or of varying

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this sub-section shall be final.

(3) Subject to the provisions of sections 82 and 83, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this section.

82. Supplementary, additional or excess grants.— (1) The *Governor shall-

(a) if the amount authorised by any law made in accordance with the provisions of section 81 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year; or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before the Houses of the Legislature another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly a demand for such excess, as the case may be.

(2) The provisions of sections 79, 80 and 81 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

83. Votes on account, votes of credit and exceptional grants.— (1) Notwithstanding anything in the foregoing provisions of this Part, the Legislative Assembly shall have power-

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in section 80 for the voting of such grant and the passing of the law in accordance with the provisions of section 81 in relation to that expenditure;

(b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the services the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year,

and the Legislature shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of sections 80 and 81 shall have effect in relation to the making of any grant under sub-section (1) and to any law to be made under that sub-section as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

84. Special provisions as to financial Bills.— (1) A Bill or amendment making provision for any of the matters specified in clauses (a) to (f) of sub-section (1) of section 77 shall not be introduced or moved except on the recommendation of the *Governor and a Bill making such provision shall not be introduced in the Legislative Council :

Provided that no recommendation shall be required under this sub-section for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason

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that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of the State shall not be passed by a House of the Legislature unless the *Governor has recommended to that House the consideration of the Bill.

Procedure Generally

85. Rules of Procedure.— (1) A House of the Legislature may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

(2) Until rules are made under sub-section (1) the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Constituent Assembly while discharging the functions of the Legislative Assembly shall have effect in relation to each House of the Legislature subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be.

(3) The *Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

86. Regulation by law of procedure in the Legislature in relation to financial business.— The Legislature may, for the purpose of the timely completion of financial business, regulate by law, the procedure of, and the conduct of business in the Houses of the Legislature in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State and, if and so far as any provision of any law so made is inconsistent with any rule made by either House of the Legislature under sub-section (1) of section 85 or with any rule or standing order having effect in relation to either House of the Legislature under sub-section (2) of that section, such provisions shall prevail.

87. Language to be used in the Legislature.— (1) Business in the Legislature shall be transacted in Urdu or in English :

Provided that the Speaker of the Legislative Assembly or the

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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Chairman of the Legislative Council or person acting as such, as the case may be, may permit any member to address the House in Hindi, or if he cannot adequately express himself in any of the aforesaid languages, to address the House in his mother-tongue.

(2) The official record of the proceedings in the Legislature shall be kept in Urdu as well as in English.

(3) The text of all Bills and amendments thereof moved in and of all Acts passed by the Legislature which shall be treated as authoritative, shall be in English.

88. Restriction on discussion in the Legislature.— No discussion shall take place in the Legislature with respect to the conduct of any Judge of the Supreme Court or of the High Court in the discharge of his duties.

89. Courts not to inquire into proceedings of the Legislature.— (1) The validity of any proceedings in the Legislature shall not be called in question on the grounds of any alleged irregularity of procedure.

(2) No officer or member of the Legislature in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

90. Requirements as to recommendations regarded as matters of procedure only.— No Act of the Legislature and no provision in any such Act shall be invalid by reason only that some recommendation required by this Constitution was not given, if assent to that Act was given by the *Governor.

*Legislative Power of the *Governor*

91. Power of Governor to promulgate Ordinances during recess of Legislature.— (1) If at any time, except when both Houses of the Legislature are in session, the *Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the power of making an Ordinance under this section shall extend only to those matters with respect to which the Legislature has power to make laws.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(2) An Ordinance promulgated under this section shall have the same force and effect as an Act of the Legislature assented to by the *Governor but every such Ordinance—

(a) shall be laid before both the Houses of the Legislature, and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, upon the resolution being agreed to by the Legislative Council, and

(b) may be withdrawn at any time by the *Governor.

[1][(3) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in sub-section (1) shall be final and conclusive and shall not be questioned in any Court on any ground.]

Explanation.— Where the Houses of the Legislature are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the latter of those dates for the purposes of this sub-section.

Breakdown of Constitutional Machinery

92. Provisions in case of failure of constitutional machinery in the State.— (1) If at any time the *Governor is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the *Governor may by Proclamation—

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by anybody or authority in the State;

(b) make such incidental and consequential provisions as appear to the *Governor to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provision of this Constitution relating to anybody or authority in the State :

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Sub-section (3) inserted *vide* Constitution of Jammu and Kashmir (Fifteenth Amendment) Act, 1976, s. 2.

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Provided that nothing in this section shall authorise the *Governor to assume to himself any of the powers vested in or exercisable by the High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to the High Court.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Any such Proclamation whether varied under sub-section (2) or not shall except where it is a Proclamation revoking a previous Proclamation, cease to operate on the expiration of six months from the date on which it was first issued.

(4) If the *Governor by a Proclamation under this section assumes to himself any of the powers of the Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by an Act of the Legislature, and any reference in this Constitution to any Acts of or laws made by the Legislature shall be construed as including a reference to such law.

(5) No Proclamation under sub-section (1) shall be issued except with the concurrence of the President of India.

(6) Every Proclamation under this section shall, except where it is a Proclamation revoking a previous Proclamation be laid before each House of the Legislature as soon as it is convened.

PART VII

THE HIGH COURT

93. Constitution of High Court.— (1) There shall be a High Court for the State, consisting of a Chief Justice and two or more other Judges.

(2) The High Court exercising jurisdiction in relation to the State immediately before the commencement of this Constitution shall be the High Court for the State.

94. High Court to be a Court of record.— The High Court shall be a court of record and shall have all the powers of such a court

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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including the power to punish for contempt of itself or of the courts subordinate to it.

95. Appointment and tenure of office of Judges.— [1][(1)] Every Judge of the High Court be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the *Governor and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and [2][shall hold office, in the case of an additional or acting judge, as provided in section 100-A, and in any other case until he attains the age of [3][sixty-two years].]

[4][(2) If any question arises as to the age of a Judge of the High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.]

96. Qualifications for appointment.— A person shall not be qualified for appointment as a Judge of the High Court unless he is a citizen of India, and -

(a) has for at least ten years held a judicial office in the State or in any other part of India; or

(b) has for at least ten years been an advocate of the State High Court or of any other High Court in India or of two or more such courts in succession.

Explanation.- for the purposes of this section in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate.

97. Oath or affirmation by Judges of the High Court.— Every person appointed to be a Judge of the High Court shall, before he enters upon his office, make and subscribe before the *Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Fifth Schedule.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. S. 95 renumbered as sub-section (1) by s. 11 *ibid.*
2. Subs. by the Constitution of Jammu and Kashmir (First Amendment) Act, 1959, s. 2, for "shall hold office until he attains the age of sixty years".
3. Subs. by s. 11, *ibid* for "sixty years".
4. Ins. by s. 11., *ibid.*

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98. Salaries, etc. of Judges.— (1) There shall be paid to the Judges of the High Court such salaries as are specified in the Fourth Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension [1][xxx] as are specified in the Fourth Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

99. Resignation or removal of a Judge of the High Court.— (1) A Judge of the High Court may, by writing under his hand addressed to the President, resign his office.

[2](2) Omitted.

[2](3) Omitted.

100. Appointment of acting Judges.— (1) When the office of the Chief Justice is vacant or when the Chief Justice is by reason of absence or otherwise unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

[3](2) Omitted.

[4][**100-A. Appointment of additional and acting Judges.**— (1) If by reason of any temporary increase in the business of the High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of the Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of the High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

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1. Certain words omitted by the Constitution of Jammu and Kashmir (First Amendment) Act, 1959, s. 3.
2. Sub-sections (2) and (3) of section 99 omitted by s. 4, *ibid.*
3. Sub-section (2) of section 100 omitted by s. 5. *ibid.*
4. Section 100-A ins. by s. 6. *ibid.*

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(3) No person appointed as an additional or acting Judge of the High Court shall hold office after attaining the age of [1][sixty-two years].

[2][**100-B. Appointment of retired Judges at sitting of the High Court.**— Notwithstanding anything in this Part, the Chief Justice of the High Court may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court in India to sit and act as Judge of the High Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be a Judge of the High Court:

Provided that nothing in this section shall be deemed to require any such person as aforesaid to sit and act as a Judge of the High Court unless he consents so to do.]

101. Place of sitting of the Court.— (1) The usual places of sitting of the High Court shall be Jammu and Srinagar.

(2) The Chief Justice shall, with the approval of the *Governor, determine the number of Judges who shall sit from time to time at Jammu and at Srinagar for such period as may be deemed necessary.

(3) Whenever it appears to the Chief Justice that it is desirable that the High Court should hold its sitting at a place other than Srinagar and Jammu, one or more Judges of the High Court as determined by him shall, with the previous approval of the *Governor, sit at such place.

102. Saving of existing Jurisdiction of the High Court.— Subject to the provisions of this Constitution and to the provisions of any law for the time being in force, the jurisdiction of and the law administered in the High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof, sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution.

103. Power to issue certain writs.—The High Court shall have power to issue to any person or authority, including in appropriate cases any Government within the State, directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo*

1. Subs. by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 12, for "sixty years".
2. Inserted by s. 13, *ibid.*

* Subs. for "Sadar-i-Riyasat" by s. 2, *ibid.*

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warranto and *certiorari*, or any of them, for any purpose other than those mentioned in clause (2-A) of Article 32 of the Constitution of India.

104. Superintendence and control of subordinate Courts.— (1) The High Court shall have superintendence and control over all Courts for the time being subject to its appellate or revisional jurisdiction and all such courts shall be subordinate to the High Court.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such court.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein :

Provided that any rules made, forms prescribed or tables settled under sub-section (2) or sub-section (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the *Governor.

105. Transfer of cases to High Court.— If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution or the Constitution of India the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

[1]**106.** Omitted.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. S. 106 omitted by the Constitution of Jammu and Kashmir (First Amendment) Act, 1959, s. 7.

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107. Seal. — (1) The High Court shall have and use as occasion may require a seal bearing a device and impression of the State emblem with an exergue or label surrounding the same with the inscription;

"The seal of the High Court of Jammu and Kashmir".

(2) The seal shall be delivered to, and kept in the custody of, the Registrar or such other officer of the court as the Chief Justice may designate in this behalf.

108. Officers and servants of the High Court.— (1) Appointments of officers and servants of the High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the court as he may direct :

Provided that the *Governor may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature, the conditions of service of the officers and servants of the High Court shall be such as may be prescribed by rules made by the High Court with the approval of the *Governor.

(3) The administrative expenses of the High Court including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

Subordinate Courts

109. Appointment of district judges.— (1) Appointment of persons to be, and the posting and promotion of, district judges in the State shall be made by the *Governor in consultation with the High Court.

(2) A person not already in the service of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or pleader and is recommended by the High Court for appointment.

[1][**109-A. Validation of postings and transfers of, and judgments, etc., delivered by, certain district judges.**— Notwithstanding

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Ins. *vide* Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967, s. 2.

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any judgment, decree or order of any court,—

(a) no posting or transfer of a district judge made at any time before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967 otherwise than in accordance with the provisions of section 109 or section 111 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such posting or transfer was not made in accordance with the said provisions :

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967, by, or before, any person posted or transferred as a district judge in the State otherwise than in accordance with the provisions of section 109 or section 111 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such posting or transfer was not made in accordance with the said provisions.]

110. Recruitment of persons other than district judges to the judicial service.— Appointments of persons other than district judges to the judicial service of the State shall be made by the *Governor in accordance with rules made by him in that behalf after consultation with the Public Service Commission and with the High Court.

111. Control over subordinate courts.— The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of the State and holding any post inferior to the post of district judge shall be vested in the High Court; but nothing in this section shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

112. Interpretation.— In this Part—

(a) The expression "district judge" includes additional dis-

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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trict judge, assistant district judge, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge, and other civil judicial posts inferior to the post of district judge.

113. Application of the provisions of this Part to certain class or classes of magistrates.— The *Governor may by public notification direct that the foregoing provisions of this Part and any rules made there-under shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

PART VIII

FINANCE, PROPERTY AND CONTRACTS

114. Taxes not to be imposed save by authority of law.— No tax shall be levied or collected except by authority of law.

115. Consolidated Fund and public account.— (1) Subject to the provisions of section 116, all revenues received by the Government, all loans raised by the Government by the issue of treasury bills, loans or ways and means advances and all moneys received by the Government in repayment of loans shall form one consolidated fund to be entitled "The Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government shall be credited to the public account of the State.

(3) No moneys out of the Consolidated Fund of the State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

116. Contingency Fund.— The Legislature may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the *Governor to enable advances to

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Legislature by law under section 82 or 83.

117. Expenditure defrayable by the State out of its revenues.— The State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which the Legislature may make laws.

118. Custody etc. of Consolidated Fund, Contingency Fund and moneys credited to the public account.— The Custody of the Consolidated Fund of the State and the Contingency Fund of the State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such Fund received by or on behalf of the Government, their payment into the public account of the State and the withdrawal of money from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature and, until provision in that behalf is so made, shall be regulated by rules made by the *Governor.

119. Custody of Suitors' deposits and other moneys received by public servants and courts.—All moneys received by or deposited with—

(a) any officer employed in connection with the affairs of the State in his capacity as such, other than revenues or public moneys raised or received by the Government, or

(b) any court within the State to the credit of any cause, matter, account or persons,

shall be paid into the public account of the State.

120. Property accruing by escheat or lapse or as bona vacantia.— Any property within the State which, if this Constitution had not come into operation, would have accrued to the Government or any other authority in the State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall vest in the State.

121. Power to carry on trade etc.— (1) The executive power of the State shall extend, subject to any law made by the State Legislature, to the carrying on of any trade or business, and to the grant, sale,

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* Subs for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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disposition or mortgage of any property held for the purposes of the State, and to the purchase or acquisition of property for those purposes and to the making of contracts.

(2) All property acquired for the purposes of the State shall vest in the State.

122. Contracts.— (1) All contracts made in the exercise of the executive powers of the State shall be expressed to be made by the *Governor and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the *Governor by such persons and in such manner as he may direct or authorise.

(2) The *Governor shall not be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of the State heretofore in force, nor shall any person making or executing any such contract or assurance on his behalf be personally liable in respect thereof.

123. Suits and proceedings.—The Government may sue or be sued by the name of the State of Jammu and Kashmir and may, subject to any provisions which may be made by Act of the Legislature enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to its affairs in the like cases as the State might have sued or been sued if this Constitution had not been enacted.

PART IX

THE PUBLIC SERVICES

124. Recruitment and conditions of service of persons serving the State.— Subject to the provisions of this Constitution, the Legislature may by law regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State :

Provided that it shall be competent for the *Governor or such person as he may direct, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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Legislature under this section and any rules so made shall have effect subject to the provisions of any such Act.

125. Tenure of office of persons serving the State.— (1) Except as expressly provided by this Constitution, every person who is a member of a civil service of the State or holds any civil post under the State holds office during the pleasure of the *Governor.

(2) Notwithstanding that a person holding a civil post under the State holds office during the pleasure of the *Governor, any contract under which a person, not being a member of a civil service of the State, is appointed to hold such a post may, if the *Governor deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

126. Dismissal, reduction or removal of persons employed in civil capacities under the State.— (1) No person who is a member of a civil service of the State or holds a civil post under the State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

[1] [(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this sub-section shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. by s. 14, *ibid.*

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(c) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonable to hold such inquiry as is referred to in sub-section (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

127. Transitional provisions.— Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as service or post under the State, shall continue in force so far as consistent with the provisions of this Constitution.

The Public Service Commission

128. Public Service Commission for the State.— There shall be a Public Service Commission (hereinafter referred to in this Part as "the Commission") for the State.

129. Appointment and term of office of members.— (1) The Chairman and other members of the Commission shall be appointed by the *Governor :

Provided that as nearly as may be one-half of the members of the Commission shall be persons who at the dates of their respective appointments have held office for at least ten years under the Government.

(2) A member of the Commission shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier :

Provided that—

(a) a member of the Commission may, by writing under his hand addressed to the *Governor, resign his office;

(b) a member of the Commission may be removed from his office in the manner hereinafter provided.

(3) A person who holds office as a member of the Commission

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

130. Removal and suspension of a member of the Commission.— (1) Subject to the provisions of sub-section (3), the Chairman or any other member of the Commission shall only be removed from his office by order of the *Governor on the ground of misbehaviour after the High Court, on reference being made to it by the *Governor, has, on inquiry held in that behalf, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The *Governor may suspend from the office the Chairman or any other member of the Commission in respect of whom a reference has been made to the High Court under sub-section (1) until the *Governor has passed orders on receipt of the report of the High Court on such reference.

(3) Notwithstanding anything in sub-section (1), the *Governor may by order remove from office the Chairman or any other member of the Commission if the Chairman or such other member, as the case may be—

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is, in the opinion of the *Governor, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of the Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of the State, the Government of India or the Government of any other State in India or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with other members of an incorporated company, he shall, for the purposes of sub-section (1), be deemed to be guilty of misbehaviour.

131. Power to make regulations as to conditions of service of members and staff of the Commission.— The *Governor may by regulations—

(a) determine the number of members of the Commission and their conditions of service; and

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service:

Provided that the conditions of service of a member of the Commission shall not be varied to his disadvantage after his appointment.

132. Prohibition as to the holding of offices by members of the Commission on ceasing to be such members.— On ceasing to hold office the Chairman and the members of the Commission shall be ineligible for further office under the Government of the State, but a member other than the Chairman shall be eligible for appointment as a Chairman of the Commission.

Explanation.—For the purposes of this section, the office of Minister or Deputy Minister shall not be deemed to be an office under the Government of the State.

133. Functions of the Commission.— (1) It shall be the duty of the Commission to conduct examinations for appointments to the services of the State.

(2) The Commission shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government including memorials or petitions relating to such matters,

and it shall be the duty of the Commission to advise on any matter so referred to them or on any other matter which the *Governor may refer to them :

Provided that the *Governor may make regulations specifying the matters in which either generally, or in any particular class of cases or in any particular circumstances, it shall not be necessary for the Commission to be consulted.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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(3) Nothing in sub-section (2) shall require the Commission to be consulted as respects the manner in which a provision may be made by the State for the reservation of appointments or posts in favour of any class of permanent residents which in the opinion of the Government is not adequately represented in the services under the State.

(4) All regulations made under the proviso to sub-section (2) by the *Governor shall be laid for not less than fourteen days before each House of the Legislature as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as the Legislative Assembly may make during the session in which they are so laid.

134. Acting appointment of Chairman of the Commission.— If the office of Chairman of the Commission becomes vacant or if the Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall until some person appointed under sub-section (1) of section 129 to the vacant office has entered on the duties thereof, or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the *Governor may appoint for the purpose.

135. Power to extend functions of the Commission.— An Act made by the Legislature may provide for the exercise of additional functions by the Commission as respects the services of the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

136. Expenses of the Commission.— The expenses of the Commission, including any salaries, allowances and pensions payable to or in respect of the members or the staff of the Commission, shall be charged on the Consolidated Fund of the State.

137. Reports of the Commission.— It shall be the duty of the Commission to present annually to the *Governor a report as to the work done by the Commission and the *Governor on receipt of such report, shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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PART X

ELECTIONS

[1][**138. Superintendence, direction and control of elections.**— The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, elections to either House of the State Legislature held under this Constitution, [2][xxx] shall vest in the Election Commission of India.]

139. No person to be ineligible for inclusion in electoral roll on grounds of religion, race, castes or sex. — There shall be one general electoral roll for every territorial constituency for election to either House of the Legislature and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, castes, sex or any of them.

140. Elections to the Legislative Assembly to be on the basis of adult suffrage.— The elections to the Legislative Assembly shall be on the basis of adult suffrage; that is to say, every person who is a permanent resident of the State and who is not less than [3][eighteen years] of age on such date as may be fixed in that behalf by or under any law made by the Legislature and is not otherwise disqualified under this Constitution or any law made by the Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

141. Power of Legislature to make provision with respect to elections to Legislature.— Subject to the provisions of this Constitution, the Legislature may from time to time by law make provision with respect to all matters relating to, or in connection with elections to either House of the Legislature, including the preparation of electoral rolls, the delimitation of constituencies, appointment of election tribunals and all other matters necessary for securing the due constitution of the two Houses.

142. Bar to interference by courts in electoral matters.— Notwithstanding anything in this Constitution—

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1. S. 138 subs. by the Constitution of Jammu and Kashmir (First Amendment) Act, 1959, s. 8.
2. Omitted *vide* Constitution of Jammu and Kashmir (Eighth Amendment) Act, 1967.
3. Subs. by Constitution of Jammu and Kashmir (Twenty-first Amendment) Act, 1989 for "twenty-one years".

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(a) the validity of any law relating to the delimitation of territorial constituencies for the purpose of electing members of the Legislative Assembly or the allotment of seats to such constituencies, made or purporting to be made under section 141, shall not be called in question in any court;

(b) no election to either House of the Legislature shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the Legislature.

[1][Provided that nothing in this clause shall preclude a person whose nomination paper has been rejected from preferring an appeal against the decision of the Returning Officer to such authority and in such manner as the Legislature may by law provide :

Provided further that the decision of the Appellate Authority on such appeal shall be final subject only to the result of the election petition, if any and shall not be called in question in any Court whatsoever notwithstanding anything contained in this Constitution.]

PART XI

MISCELLANEOUS PROVISIONS

143. Protection of *Governor.—The *Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Provided that nothing in this sub-section shall be constured as restricting the right of any person to bring appropriate proceedings against the Government.

(2) No criminal proceedings whatsoever shall be instituted or continued against the *Governor in any court during his term of office.

(3) No process for the arrest or imprisonment of the *Governor shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the *Governor shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him

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1. Proviso added by the Constitution of Jammu and Kashmir (Thirteenth Amendment) Act, 1975.

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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in his personal capacity, whether before or after he entered upon his office as *Governor, until the expiration of two months next after notice in writing has been delivered to the *Governor or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

144. Flag of the State.— The Flag of the State shall be rectangular in shape and red in colour with three equidistant white vertical stripes of equal width next to the staff and a white plough in the middle with the handle facing the stripes.

The ratio of the length of the flag to its width shall be 3:2

145. Official language of the State.— The official language of the State shall be Urdu but the English language shall unless the Legislature by law otherwise provides, continue to be used for all the official purposes of the State for which it was being used immediately before the commencement of this Constitution.

146. Academy for development of Art, Culture and Languages.— The *Governor shall, as soon as may be, after the commencement of the Constitution, establish an Academy of Arts, Culture and Languages where opportunities will be afforded for the development of Art and Culture of the State and for the development of Hindi, Urdu and other regional languages of the State specified in the Sixth Schedule.

PART XII

AMENDMENT OF THE CONSTITUTION

147. Amendment of the Constitution.— An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly, and when the Bill is passed in each House by a majority of not less than two-third of the total membership of that House, it shall be presented to the *Governor for his assent and, upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

Provided that a Bill providing for the abolition of the Legislative Council may be introduced in the Legislative Assembly and passed by it by a majority of the total membership of Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting :

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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Provided further that no Bill or amendment seeking to make any change in—

(a) this section; or

(b) the provisions of section 3 and 5; or

(c) the provisions of the Constitution of India as applicable in relation to the State,

shall be introduced or moved in either House of the Legislature.

PART XIII
TRANSITIONAL PROVISIONS

[1]148. Omitted.

[1]149. Omitted.

[1]150. Omitted.

[1]151. Omitted.

[1]152. Omitted.

153. Provisions as to Judges of High Court.— Notwithstanding anything in section 96, the Judges of the High Court holding office immediately before the commencement of this Constitution, shall, unless they have elected otherwise, become on such commencement the Judges of the High Court under this Constitution and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under section 98 in respect of the Judges of the High Court.

154. Courts authorities and officers to continue to function subject to the provisions of the Constitution.— All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of the State, shall exercise their respective functions subject to the provisions of this Constitution.

155. Moneys received or raised or expenditure incurred between the commencement of the Constitution and the 31st day of March, 1957.— The provisions of this Constitution relating to the Consolidated Fund of the State and the appropriation of moneys out of the same shall not apply in relation to moneys received or raised or expenditure incurred by the Government between the commencement of this Constitution and the thirty-first day of March, 1957, both days inclusive, and any expenditure incurred during that period shall be deemed to be duly authorised if the expenditure was specified in the

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1. Sections 148, 149, 150, 151 and 152 omitted by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 15.

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sanctioned estimate for 1956-57 or is authorised by the *Governor in accordance with such rules as were applicable to the authorisation of expenditure from the revenues of State immediately before such commencement.

156. Power of *Governor to remove difficulties.— (1) The *Governor may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Jammu and Kashmir Constitution Act, 1996 BR, to the provisions of this Constitution by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient :

Provided that no such order shall be made after the first meeting of the two Houses of the Legislature after their due constitution under the provisions of Part VI.

(2) Every order made under sub-section (1) shall be laid before the Provisional Legislature, or the newly constituted Legislature, as the case may be.

157. Repeal and saving of laws and rules.— (1) The Jammu and Kashmir Constitution Act, 1996 BR (XIV of 1996 BR) is hereby repealed.

(2) Notwithstanding the repeal of the said Act but subject to the other provisions of this Constitution, all the laws in force in the State immediately before the commencement of this Constitution shall continue in force until altered or repealed or amended by competent authority.

(3) All notifications published, proclamations issued, powers conferred, jurisdiction vested, forms prescribed, local limits defined, and orders, rules and appointments made under any regulation, order, law or rule in force immediately before the coming into operation of this Constitution and which are not inconsistent with any of the provisions of this Constitution, shall be deemed to have been respectively published, issued, conferred, vested, prescribed, defined and made under this Constitution and shall remain in force until repealed or modified either expressly or by implication by competent authority.

158. Interpretation.— Unless the context otherwise requires the General Clauses Act, S. 1977, shall apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the State Legislature.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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[1]FIRST SCHEDULE

XXX

SECOND SCHEDULE

(See section 30)

EMOLUMENTS, ALLOWANCES AND PRIVILEGES OF THE *GOVERNOR

1. *Emoluments.* - The emoluments of the *Governor shall be [2][Rs. 11,000] per month.

2. *Allowances.*- In order that the *Governor may be enabled to discharge conveniently and with dignity the duties of his office there shall also be paid in cash each year for each of the purposes specified below such amount [3][as may be required by the *Governor and as does not, except in cases provided for in para 3, exceed the maximum amount provided hereunder] :-

Maximum amount provided

(i)	Sumptuary Allowance ..	[4][Rs. 50,000
(ii)	Staff and Household ..	Rs. 1,35,000
(iii)	Tour Expenses ..	Rs. 30,000
(iv)	Allowances for Miscellaneous Expenses ..	Rs. 20,000
	Total ..	2,35,000]

NOTE.- The grants specified above shall be operated upon in consultation with the Government.

3. The *Governor may in case of necessity in consultation with the Government sanction [5][re-appropriations in respect of or additions to, the grants] specified in para 2.

4. (1) The *Governor shall throughout his term of office, be entitled without payment of rent or hire, to the use of his furnished official residence and of motor vehicles specified in the sub-joined table and the maintenance of such residence and motor vehicles shall be at the State expense.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Omitted by Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 16.
2. Subs. by Constitution of Jammu and Kashmir (Nineteenth Amendment) Act, 1987.
3. Subs. by Constitution of Jammu and Kashmir (Seventh Amendment) Act, 1965, s. 2.
4. Ins. by Constitution of Jammu and Kashmir (Second Amendment) Act, 1960, s. 2.
5. Subs. by Constitution of Jammu and Kashmir (Tenth Amendment) Act, 1968, s. 2.

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[1][Provided that-

(i) if the *Governor occupies as his official residence at Srinagar or Jammu a suitable building owned by him, he shall be paid such allowance not exceeding Rs. 12,000 per annum as may be determined by the Government for the maintenance of such buildings;

(ii) the provisions of clause (i) shall be deemed to have come into force with effect from the twenty-sixth day of January, 1957.]

(2) The items specified in the sub-joined table may be varied or amended by the *Governor with the concurrence of the Government.

Explanation. — For the purposes of this order-

(a) "official residence" means the official residence to be specified by the Government by notifications and includes the staff quarters and other buildings appurtenant thereto and the gardens thereof;

(b) maintenance in respect of motor vehicles specified in the sub-joined table would include pay and allowances of chauffeurs and the provisions of oil and petrol.

5. There shall be paid to the *Governor in connection with his assumption of office, and allowance equal to his actual expenses in travelling, with his family, if any, and his family effects, to take up his duties and a similar allowance on his vacating the office to return to the place where he ordinarily resided at the time of his appointment.

6. The *Governor shall be entitled to the free supply of water and electricity for his domestic use.

7. All motor vehicles specified in the table and any private car owned or maintained by the *Governor shall be exempt from payment of any toll or tax leviable under any statute or bye-law.

8. The *Governor, any member of his family and the staff accompanying him shall be entitled to stay free of rent in any Dak Bungalow or Rest House maintained by the Government.

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1. Ins. by the Constitution of Jammu and Kashmir (Second Amendment) Act, 1960, s. 2.

* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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TABLE

Motor Cars	:	Two
Jeep	:	One
Station Wagon	:	[1][Two]
Motor Cycle	:	One

THIRD SCHEDULE

(See section 62)

SALARIES AND ALLOWANCES OF THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL

1. There shall be paid to the Speaker of the Legislative Assembly and the Chairman of the Legislative Council such salaries and allowances as are payable to a Minister of the State Government under the law for the time being in force.

2. (1) There shall be paid to the Deputy Speaker of the Legislative Assembly such salary and allowances as were payable to him immediately before the commencement of this Constitution.

(2) There shall be paid to the Deputy Chairman of the Legislative Council such salary and allowances as the *Governor may determine.

[2][FOURTH SCHEDULE]

(See section 98)

Salaries, Allowances and other conditions of service of the Judges of the High Court

1. There shall be paid to the Judges of the High Court in respect of time spent on actual service, salary at the following rates per mensem, that is to say:-

The Chief Justice	:	[3][9,000 rupees]
Any Other Judge	:	[3][8,000 rupees]

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

1. Subs. for "one" *vide* SRO-119, dated 26-3-1968.
2. Fourth Schedule subs. by the Constitution of Jammu and Kashmir (First Amendment) Act, 1959, s. 9.
3. Subs. by Constitution of Jammu and Kashmir (Nineteenth Amendment) Act, 1987.

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Provided that if a Judge of the High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced—

(a) by the amount of that pension; and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension; and

(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.

2. The rights in respect of leave of absence (including leave allowances) and pension and other conditions of service of the Judges of the High Court shall be governed by the provisions of the High Court Judges (Conditions of Service) Act, 1954 (Central Act No. 28 of 1954) and the rules made thereunder, for the time being in force, as if the said Act and the said rules were applicable to the Judges of the High Court of Jammu and Kashmir; and in their application to the Judges of the High Court of Jammu and Kashmir—

(a) any reference in those provisions to the State, [1][***] High Court, Chief Justice, acting Chief Justice, Judge, additional Judge, acting Judge and General Provident fund (Central Services) shall be construed, unless the context otherwise requires, as including a reference to the State of Jammu and Kashmir, [1][***] the High Court of Jammu and Kashmir and the Chief Justice, acting Chief Justice, Judge, additional Judge and acting Judge, of the High Court of Jammu and Kashmir, and State General Provident Fund respectively;

(b) any reference in those provisions to the "Commencement of this Act" shall be construed as a reference to the commencement of the Constitution of Jammu and Kashmir (First Amendment) Act, 1959.

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1. Omitted by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 17.

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3. In this Schedule, unless the context otherwise requires,—-

(a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" includes an additional Judge and an acting Judge;

(b) "actual service" includes—

(i) time spend by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;

(ii) Vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

[1][4. (1) In the calculation of service for pension of a Judge of any other High Court in India transferred to the High Court of Jammu and Kashmir, his actual service as a Judge of any other High Court in India shall also be reckoned as service for pensions as a Judge of the High Court of Jammu and Kashmir.

(2) In the calculation of the amount of leave at the credit of a Judge of any other High Court in India transferred to the High Court of Jammu and Kashmir, the amount of leave due to him as a Judge of any other High Court in India shall be added to the amount of leave at his credit as a Judge of the High Court of Jammu and Kashmir.]

FIFTH SCHEDULE

(See sections 40, 64 and 97)

FORMS OF OATHS OR AFFIRMATIONS

Oath for a Minister

FORM A

"I, A. B. do $\frac{\text{Swear in the name of God}}{\text{Solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of the State as by law established, [2][that I will uphold the sovereignty and integrity of India], that

1. Added by the Constitution of Jammu and Kashmir (Fourth Amendment) Act, 1963, s. 2.

2. Ins. by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 18.

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I will faithfully and conscientiously discharge the duty upon which I am about to enter, and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will.

I further do swear in the name of God/Solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State except as may be required for the due discharge of my duties as such Minister".

FORM B

Oath for a Deputy Minister

"I, A.B. do $\frac{\text{Swear in the name of God}}{\text{Solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of the State as by law established, [1][that I will uphold the sovereignty and integrity of India] and that I will faithfully and conscientiously discharge the duty upon which I am about to enter, and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will.

I further do $\frac{\text{Swear in the name of God}}{\text{Solemnly affirm}}$ that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Deputy Minister for the State except as may be required for the due discharge of my duties as such Minister".

[2][FORM C

(I)

Form of Oath or affirmation to be made by a candidate for election to the State Legislature

"I, A.B. having been nominated as a candidate to fill a seat in the Legislative Assembly, (or Legislative Council) do swear in the name

1. Ins. by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 18.
2. Form C subs. by s. 18, *ibid.*

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of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established and that I will uphold the sovereignty and integrity of India".

(II)

Form of oath or affirmation to be made by a member of the State Legislature

"I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter".]

FORM D

Oath or affirmation to be made by the judges of the High Court

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court of Jammu and Kashmir do swear in the name of God/ solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established [1][that I will uphold the sovereignty and integrity of India], that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws".

SIXTH SCHEDULE

(See section 146)

Regional Languages

1. Kashmiri
2. Dogri
3. Balti (Pali).
4. Dardi.
5. Punjabi.
6. Pahari.
7. Ladakhi.

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1. Ins. bythe constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 18.

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[1][SEVENTH SCHEDULE

[Section 69(3)]

Provision as to disqualification on ground of defection.

1. Interpretation.— In this Schedule, unless the context otherwise requires.—

(a) "House" means either House of the Legislature of the State;

(b) "Legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or , as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

(c) "Leader" in relation to a Legislature party means a member of the party chosen by it as its leader and includes any other member of the party authorised by the party to act, in the absence of the leader, as, or discharge the functions of, the leader for the purpose of this Schedule;

(d) "Original political party", in relation to a member of a House, means the political party to which he belongs for the purpose of sub-paragraph (1) of paragraph 2;

(e) "Paragraph" means a paragraph of this Schedule.

2. Disqualification on ground of defection.— (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

(a) if he was voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

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1. Added by the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987.

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Explanation.— For the purpose of this sub-paragraph—

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall,—

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or as the case may be, first becomes member before the expiry of six months from the date on which he takes his seat after complying with the requirements of section 64.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of section 64.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who on the commencement of the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987 is a member of a House (whether elected or nominated as such) shall,—

(i) where he was a member of a political party, immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

3. Disqualification on ground of defection not to apply in case of split.— Where a member of a House makes a claim that he and any

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other members of his Legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such Legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground—

(i) that he has voluntarily given up his membership of his original political party;

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

4. Disqualification on ground of defection not to apply in case of merger.— (1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other member of his original political party,—

(a) have become members of such other political party or, as the case may be, of a new political party formed by such member; or

(b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of

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the members of the Legislature party concerned have agreed to such merger.

5. Exemption.— Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the Legislative Assembly or the Chairman or the Deputy Chairman of the Legislative Council shall not be disqualified under this Schedule--

(a) if he, by reason of his election to such office voluntarily gives up the membership of the political party to which he belongs immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or becomes a member of another political party;

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

6. Decision on questions as to disqualification on ground of defection.— (1) If any question arises as to whether a member of the House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Leader of the Legislature party to which such member belongs and his decision shall be final :

Provided that where the question which has arisen relates to a member belonging to a political party which has not elected any Leader of its Legislature party, the question shall be referred for the decision of the Speaker or, as the case may be, the Chairman and his decision shall be final:

Provided further that where the question which has arisen related to a member not belonging to any political party, the question shall be referred for the decision of the Speaker or the Chairman, as the case may be, and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in the House within the meaning of section 89.

7. Bar of jurisdiction of Courts.— Notwithstanding anything in this Constitution, no Court shall have any jurisdiction in respect of

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any matter connected with the disqualification of a member of a House under this Schedule.

8. Rules.— (1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of the House may make rules for giving effect to the provisions of this Schedule, and in particular, and without prejudice to the generality of the foregoing provisions, such rules may provide for,—

(a) the maintenance of registers or other records as to the political parties if any to which different members of the House belong;

(b) the report which the Leader of a Legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any members of the House and the officer of the house to whom such report shall be furnished; and

(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

(2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved they shall be of no effect.

(3) The Chairman or the Speaker of the House may, without prejudice to the provisions of section 72 and to any other power which he may have under this Constitution direct that any wilful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House.]

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APPENDIX

THE CONSTITUTION OF JAMMU AND KASHMIR (FIRST AMENDMENT) ACT, 1959

No. XIX of 1959

[13th October, 1959]

An Act to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Legislature of Jammu and Kashmir in the Tenth Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called the Constitution of Jammu and Kashmir (First Amendment) Act, 1959.

(2) It shall come into force on the twenty-sixth day of January, 1960.

2. Amendment of section 95.—In section 95 of the Constitution of Jammu and Kashmir (hereinafter referred to as the Constitution), for the words "shall hold office until he attains the age of sixty years", the following words, figures, and letter shall be substituted, namely :—

"shall hold office, in the case of an additional or acting Judge, as provided in section 100-A, and in any other case, until he attains the age of sixty years".

3. Amendment of section 98.—In section 98 of the Constitution, in sub-section (2) the words "as may from time to time be determined by or under law made by the Legislature, and until so determined, to such allowances and rights" shall be omitted.

4. Amendment of section 99.—In section 99 of the Constitution, sub-section (2) and sub-section (3) shall be omitted.

5. Amendment of section 100.— In section 100 of the Constitution, sub-section (2) shall be omitted.

6. Insertion of new section 100-A.— After section 100 of the Constitution, the following section shall be inserted, namely :—

"100-A. Appointment of additional and acting Judges.— (1) If by reason of any temporary increase in the business of the High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

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(2) When any Judge of the High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of the High Court shall hold office after attaining the age of sixty years."

7. Omission of section 106.— Section 106 of the Constitution shall be omitted.

8. Substitution of new section for section 138.— For section 138 of the Constitution, the following section shall be substituted, namely:—

"138. Superintendence, direction and control of elections.— The Superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of elections to either House of the State Legislature held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of, or in connection with, such elections shall vest in the Election Commission of India."

9. Substitution of new Schedule for Fourth Schedule.— For the Fourth Schedule to the Constitution, the following Schedule shall be substituted, namely :—

FOURTH SCHEDULE

(See section 98)

Salaries, Allowances and other conditions of service of the Judges of the High Court

1. There shall be paid to the Judges of the High Court in respect of time spent on actual service, salary at the following rates per mensem, that is to say:—

The Chief Justice	:	4,000 rupees.
Any Other Judge	:	3,500 rupees:

Provided that if a Judge of the High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of

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India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.

2. The rights in respect of leave of absence (including leave allowances) and pension and other conditions of service of the Judges of the High Court shall be governed by the provisions of the High Court Judges (Conditions of Service) Act, 1954 (Central Act No. 28 of 1954) and the rules made thereunder, for the time being in force, as if the said Act and the said rules were applicable to the Judges of the High Court of the Jammu and Kashmir; and in their application to the Judges of the High Court of Jammu and Kashmir—

(a) any reference in those provisions to the State, Sadar-i-Riyasat, High Court, Chief Justice, acting Chief Justice, Judge, additional Judge, acting Judge and General Provident fund (Central Services) shall be construed, unless the context otherwise requires, as including a reference to the State of Jammu and Kashmir, Sadar-i-Riyasat, the High Court of Jammu and Kashmir and the Chief Justice, acting Chief Justice, Judge, additional Judge and acting Judge of the High Court of Jammu and Kashmir, and State General provident fund respectively;

(b) any reference in those provisions to the "Commencement of this Act" shall be construed as a reference to the commencement of the Constitution of Jammu and Kashmir (First Amendment) Act, 1959.

3. In this Schedule, unless the context otherwise requires,—

(a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" includes an additional Judge and an acting Judge;

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(b) "actual service" includes—

(i) time spend by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

THE CONSTITUTION OF JAMMU AND KASHMIR (SECOND AMENDMENT) ACT, 1960

No. XI of 1960

[22nd March, 1960]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Eleventh Year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Second Amendment) Act, 1960.

2. Amendment of Second Schedule to the Constitution of Jammu and Kashmir. — In the Second Schedule to the Constitution of Jammu and Kashmir—

(a) in paragraph 2, for the words and figures "Rs. 15,000; Rs. 75,000; Rs. 10,000; Rs. 9,000 and Rs. 1,09,000" the words and figures "Rs. 30,000; Rs. 1,20,000; Rs. 15,000; Rs. 20,000 and Rs. 1,85,000" shall respectively be substituted;

(b) to sub-paragraph (1) of paragraph 4 the following proviso shall be inserted, namely:—

"Provided that:

(i) if the Sadar-i-Riyasat occupies as his official residence at Srinagar or Jammu a suitable building owned by him, he shall be paid such allowance not exceeding Rs. 12,000 per annum as may be determined by the Government for the maintenance of such building;

(ii) the provisions of clause (i) shall be deemed to have come into force with effect from the twenty-sixth day of January, 1957".

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THE CONSTITUTION OF JAMMU AND KASHMIR (THIRD AMENDMENT) ACT, 1961

[14th March, 1961]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twelfth year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Third Amendment) Act, 1961.

2. Amendment of Section 49 of the Constitution of Jammu and Kashmir.— In sub-section (2) of section 49 of the Constitution of Jammu and Kashmir for the words "five years" the words "thirteen years" shall be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (FOURTH AMENDMENT) ACT, 1963

[27th March, 1963]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Fourteenth year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Fourth Amendment) Act, 1963.

2. Amendment of Fourth Schedule to the Constitution of Jammu and Kashmir.— In the Fourth Schedule to the Constitution of Jammu and Kashmir, after paragraph 3, the following paragraph shall be added, namely :—

"4. (1) In the calculation of service for pension of a Judge of any other High Court in India transferred to the High Court of Jammu and Kashmir, his actual service as a Judge of any other High Court in India shall also be reckoned as service for pension as a Judge of the High Court of Jammu and Kashmir.

(2) In the calculation of the amount of leave at the credit of a Judge of any other High Court in India transferred to the High Court of Jammu and Kashmir, the amount of leave due to him as a Judge of any other High Court in India shall be added to the amount of leave at his credit as a Judge of the High Court of Jammu and Kashmir."

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THE CONSTITUTION OF JAMMU AND KASHMIR (FIFTH AMENDMENT) ACT, 1963

[1st October, 1963]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Fourteenth year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Fifth Amendment) Act, 1963.

2. Amendment of section 50 of the Constitution of Jammu and Kashmir.— In section 50 of the Constitution of Jammu and Kashmir :—

(a) in sub-section (4), clauses (c) and (d) shall be omitted ;
(b) in sub-section (6), for the word "Six" the word "Eight" shall be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (SIXTH AMENDMENT) ACT, 1965

[10th April, 1965]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Legislature of Jammu and Kashmir in the Sixteenth Year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965.

2. Amendment of the Constitution.— In the Constitution of Jammu and Kashmir (hereinafter referred to as the Constitution) except in Parts XII and XIII for the expression "Sadar-i-Riyasat" and "Prime Minister" wherever they occur the expressions "Governor" and "Chief Minister" shall respectively be substituted.

3. Amendment of section 2.— In section 2 of the Constitution, after sub-section (2), the following sub-section shall be inserted, namely :—

"(3) Any reference in this Constitution to the Sadar-i-Riyasat shall, unless the context otherwise requires, be construed as a reference to the Governor."

4. Substitution of new section for section 27.— For section 27 of the Constitution, the following section shall be substituted, namely:—

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"**27. Appointment of Governor.**— The Governor shall be appointed by the President by warrant under his hand and seal :

Provided that the person holding office as Sadar-i-Riyasat immediately before the commencement of the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, shall on such commencement be the Governor and shall, subject to the other provisions of this Constitution, continue to hold office as Governor until the remaining period of his term for which he was elected as Sadar-i-Riyasat expires."

5. Substitution of new section for section 29.— For section 29 of the Constitution, the following section shall be substituted, namely :—

"**29. Qualifications for appointment as Governor.**— No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty years."

6. Amendment of section 30.— In section 30 of the Constitution, in sub-section (1) for the words "Elected and recognised" the word "appointed" shall be substituted.

7. Substitution of new section for section 31.— For section 31 of the Constitution, the following section shall be substituted, namely:—

"**31. Oath of Office.**— The Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court or, in his absence, the senior most Judge of that Court available, an oath or affirmation in the following form, that is to say—

'I, A.B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) or Jammu and Kashmir and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of the State.'

8. Omission of section 32.— Section 32 of the Constitution shall be omitted.

9. Substitution of new section for section 33.— For section 33 of the Constitution, the following section shall be substituted, namely:—

"**33. Discharge of the functions of the Governor in certain contingencies.**— The President may make such provisions as he thinks fit for the discharge of functions of the Governor in any contingency not provided for in this Part."

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10. Amendment of section 51.— In section 51 of the Constitution, for clause (a), the following clause shall be substituted, namely:—

"(a) is a permanent resident of the State, and makes and subscribes before some person authorised in that behalf by the Election Commission of India an oath or affirmation according to the form set out for the purpose in the Fifth Schedule."

11. Amendment of section 95.— Section 95 of the Constitution shall be renumbered as sub-section (1) of that section, and—

(a) in sub-section (1) as so, renumbered, for the words 'sixty years' the words 'sixty-two years' shall be substituted;

(b) after sub-section (1) the following sub-section shall be inserted, namely :—

"(2) If any question arises as to the age of a Judge of the High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

12. Amendment of section 100-A.— In section 100-A of the Constitution, in sub-section (3), for the words 'sixty years' the words 'sixty-two years' shall be substituted.

13. Insertion of new section 100-B.— After section 100-A of the Constitution, the following section shall be inserted, namely :—

"100-B. Appointment of retired Judges at sitting of the High Court.—Notwithstanding anything in this Part, the Chief Justice of the High Court may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court in India to sit and act as Judge of the High Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be a Judge of the High Court :

Provided that nothing in this section shall be deemed to require any such person as aforesaid to sit and act as a Judge of the High Court unless he consents so to do."

14. Amendment of section 126.— In section 126 of the Constitution, for sub-sections (2) and (3) the following sub-sections shall be substituted, namely :—

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"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this sub-section shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reasons, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in sub-section (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

15. Omission of sections 148 to 152.— Sections 148, 149, 150, 151 and 152 of the Constitution shall be omitted.

16. Omission of the First Schedule.— The First Schedule to the Constitution shall be omitted.

17. Amendment of the Fourth Schedule.— In the Fourth Schedule to the Constitution, in paragraph 2, in clause (a) the words "Governor" and "Sadar-i-Riyasat" shall be omitted.

18. Amendment of the Fifth Schedule.— In the Fifth Schedule to the Constitution—

(a) in Forms A, B and D, after the words "Constitution of the State as by law established" the words "that I will uphold the sovereignty and integrity of India" shall be inserted;

(b) for Form C, the following shall be substituted, namely :—

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"Form C

(I)

Form of oath or affirmation to be made by a candidate for election to the State Legislature

I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly, (or Legislative Council) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established and that I will uphold the sovereignty and integrity of India.

(II)

Form of oath or affirmation to be made by a member of the State Legislature

I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

19. Construction of reference to "Sadar-i-Riyasat" and "Prime Minister" in other laws, orders, etc.— Any reference in any other law, Ordinance, order, rule, buy-law, notification or regulation in force in the State immediately before the commencement of the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, to the *Governor or the Prime Minister shall, unless the context otherwise requires, be constructed respectively as a reference to the Governor or the Chief Minister.

20. Savings.— Anything done or any action taken (including any order, rule, appointment or delegation made, notification, order, instruction or direction issued) before the commencement of the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, by or on behalf of the Sadar-i-Riyasat or the Prime Minister under the provisions of the Constitution or any other law in force in the State shall continue in force unless and until superseded by anything done or any action taken by or on behalf of the Governor, the Chief Minister, or, as the case may be, any other competent authority.

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* Subs. for "Sadar-i-Riyasat" by the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965, s. 2.

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THE CONSTITUTION OF JAMMU AND KASHMIR (SEVENTH AMENDMENT) ACT, 1965

[13th April, 1965]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Sixteenth year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Seventh Amendment) Act, 1965.

2. Amendment of the Second Schedule, Constitution of Jammu and Kashmir.— In the Second Schedule to the Constitution of Jammu and Kashmir in paragraph 2, for the letters and figures "Rs. 30,000" "Rs. 1,20,000", "Rs. 15,000", "Rs. 20,000", and "Rs. 1,85,000", the letters and figures "Rs. 50,000", "Rs. 1,35,000", "Rs. 30,000", "Rs. 20,000" and Rs. 2,35,000", shall respectively be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (EIGHTH AMENDMENT) ACT, 1967

[25th August, 1967]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Eighteenth Year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Eighth Amendment) Act, 1967.

2. Amendment of Section 138.— In section 138 of the Constitution of Jammu and Kashmir, the words, "including the appointment of election tribunals for the decision of doubts and disputes arising out of, or in connection with, such elections" shall be omitted.

THE CONSTITUTION OF JAMMU AND KASHMIR (NINTH AMENDMENT) ACT, 1967

[15th October, 1967]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Eighteenth year of the Republic of India as follows :—

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1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967.

2. Insertion of new section 109-A.— After section 109 of the Constitution of Jammu and Kashmir, the following section shall be inserted, namely :-

"109-A. Validation of posting and transfers of and, judgments. etc., delivered by, certain district judges.— Notwithstanding any judgment, decree or order of any court—

(a) no posting or transfer of a district judge made at any time before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967, otherwise than in accordance with the provisions of section 109 or section 111 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such posting or transfer was not made in accordance with the said provisions.

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967 by, or before, any person posted or transferred as a district Judge in the State otherwise than in accordance with the provisions of the section 109 or section 111 shall be deemed to be illegal or invalid or ever to have become illegal or invalid or by reason only of the fact that such posting or transfer was not made in accordance with the said provisions."

THE CONSTITUTION OF JAMMU AND KASHMIR (TENTH AMENDMENT) ACT, 1968

[10th October, 1968]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Nineteenth year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Tenth Amendment) Act, 1968.

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2. Amendment of the Second Schedule to the Constitution of Jammu and Kashmir.— In the Second Schedule to the Constitution of Jammu and Kashmir—

(a) in para 2, for the words, "not exceeding the maximum provided hereunder, as may be required by the Governor", the words "as may be required by the Governor and as does not, except in cases provided for in para 3, exceed the maximum amount provided hereunder", shall be substituted;

(b) in para 3, for the words, "re-appropriations in respect of the grants", the words, "re-appropriations in respect of or additions to the grants", shall be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (ELEVENTH AMENDMENT) ACT, 1970

[24th October, 1970]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twenty-first Year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Eleventh Amendment) Act, 1970.

2. Amendment of section 49 of the Constitution of Jammu and Kashmir.— In sub-section (2) of section 49 of the Constitution of Jammu and Kashmir for the words, "thirteen years" the words "twenty-three years" shall be and shall always be deemed to have been substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (TWELFTH AMENDMENT) ACT, 1975

[19th August, 1975]

An Act further to amend the Constitution of Jammu and Kashmir.

Be in enacted by the Jammu and Kashmir State Legislature in the Twenty-sixth Year of the Republic of India as follows :—

1. Short title and commencement.— (1) This Act may be called the Constitution of Jammu and Kashmir (Twelfth Amendment) Act, 1975.

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(2) This section shall come into force at once and the remaining provisions of this Act shall come into force on such date as the Government may, by notification in the Government Gazette, appoint.

2. Amendment of section 47 of the Constitution of Jammu and Kashmir.— In section 47 of the Constitution of Jammu and Kashmir (hereinafter referred to as the Constitution) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) For the purposes of sub-section (1), the State shall be divided into single member territorial constituencies by such authority and in such manner as the Legislature may by law determine."

3. Amendment of section 48 of the Constitution.— In clause (a) of section 48 of the Constitution for the words, "twenty-five seats" the words, "twenty-four seats", shall be substituted.

4. Insertion of new section after section 48 of the Constitution.— After section 48 of the Constitution the following section shall be inserted, namely :—

"48-A. Holding of general election in the event of earlier dissolution of Legislative Assembly. — Notwithstanding anything contained in this Constitution if upon the completion of a census, but before the final readjustment of territorial constituencies, the Legislative Assembly is dissolved prior to the expiry of its duration and the Governor is satisfied that holding of general election without delay is necessary, he may after consulting the Election Commission, by notification direct that the general election shall be held on "the basis of the last preceding delimitation of territorial constituencies."

5. Amendment of section 49 of the Constitution.— In section 49 of the Constitution, clause (a) of explanation to sub-section (1) shall be substituted, by the following namely :—

"(a) the expression 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published; and"

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THE CONSTITUTION OF JAMMU AND KASHMIR (THIRTEENTH AMENDMENT) ACT, 1975

[19th August, 1975]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twenty-sixth Year of the Republic of India as follows :—

1. Short title and commencement.— (1) This Act may be called the Constitution of Jammu and Kashmir (Thirteenth Amendment) Act, 1975.

(2) This Act shall come into force on the date it is published in the Government Gazette.

2. Amendment of section 142 of the Constitution of Jammu and Kashmir.— In section 142 of the Constitution of Jammu and Kashmir, the full-stop at the end of clause (b) shall be substituted by colon and thereafter the following provisos shall be added, namely :—

"Provided that nothing in this clause shall preclude a person whose nomination paper has been rejected from preferring an appeal against the decision of the Returning Officer to such authority and in such manner as the Legislature may by law provide :

Provided further that the decision of the Appellate Authority on such appeal shall be final subject only to the result of the election petition, if any and shall not be called in question in any Court whatsoever notwithstanding anything contained in this Constitution."

THE CONSTITUTION OF JAMMU AND KASHMIR (FOURTEENTH AMENDMENT) ACT, 1976

[12th March, 1976]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Fourteenth Amendment) Act, 1976.

2. Amendment of section 68 of the Constitution of Jammu and Kashmir.— For sub-section (2) of section 68 of the Constitution of Jammu and Kashmir, the following shall be substituted, namely:—

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"(2) If a member of a House of the Legislature resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant :

Provided that if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation."

THE CONSTITUTION OF JAMMU AND KASHMIR (FIFTEENTH AMENDMENT) ACT, 1976

[12th March, 1976]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twenty-seventh year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Fifteenth Amendment) Act, 1976.

2. Amendment of section 91 of the Constitution of Jammu and Kashmir.— In section 91 of the Constitution of Jammu and Kashmir, after sub-section (2) the following sub-section shall be and shall always be deemed to have been inserted, namely :—

"(3) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in sub-section (1) shall be final and conclusive and shall not be questioned in any Court on any ground."

THE CONSTITUTION OF JAMMU AND KASHMIR (SIXTEENTH AMENDMENT) ACT, 1977

[17th February, 1977]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Twenty-eighth Year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Sixteenth Amendment) Act, 1977.

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2. Amendment of section 52 of the Constitution of Jammu and Kashmir.— (1) In sub-section (1) of section 52 of the Constitution of Jammu and Kashmir, for the words "five years" the words "six years" shall be substituted.

(2) The amendment made by sub-section (1) to section 52 shall apply also to the Legislative Assembly in existence on the date of coming into force of this Act without prejudice to the power of the State Legislature with respect to the extension of the duration of the Legislative Assembly under the proviso to that sub-section.

THE CONSTITUTION OF JAMMU AND KASHMIR (SEVENTEENTH AMENDMENT) ACT, 1979

[29th September, 1979]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Thirtieth year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Seventeenth Amendment) Act, 1979.

2. Amendment to section 49 of the Constitution of Jammu and Kashmir.— In sub-section (2) of section 49 of the Constitution of Jammu and Kashmir for the words, "twenty-three years" the words "thirty-three years" shall be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (EIGHTEENTH AMENDMENT) ACT, 1987

[3rd July, 1987]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Thirty-eighth year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987.

2. Amendment of section 69 of the Constitution of Jammu and Kashmir. — In section 69 of the Constitution of Jammu and Kashmir (hereinafter referred to as 'the State Constitution'),—

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(a) in sub-section (2) for the words "of this section" the words, brackets and figure "of sub-section (1)" shall be substituted;

(b) after sub-section (2) the following sub-section shall be inserted, namely :—

"(3) A person shall be disqualified for being a member of either House of Legislature if he is so disqualified under the Seventh Schedule."

3. Amendment of section 70 of the Constitution of Jammu and Kashmir.— In section 70 of the State Constitution, for the word and figures "section 69" wherever occurring, the words, brackets and figures "sub-section (1) of section 69" shall be substituted.

4. Addition of Seventh Schedule to the State Constitution.— After the Sixth Schedule to the State Constitution, the following Schedule shall be added, namely :—

"SEVENTH SCHEDULE

[Section 69 (3)]

Provision as to disqualification on ground of defection.

1. Interpretation.— In this Schedule, unless the context otherwise requires,—

(a) "House" means either House of the Legislature of the State;

(b) "Legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or , as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

(c) "Leader" in relation to a Legislature party means a member of the party chosen by it as its leader and includes any other member of the party authorised by the party to act, in the absence of the leader, as, or discharge the functions of, the leader for the purpose of this Schedule;

(d) "Original political party", in relation to a member of a House, means the political party to which he belongs for

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the purpose of sub-paragraph (1) of paragraph 2;

(e) "Paragraph" means a paragraph of this Schedule.

2. Disqualification on ground of defection.—(1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

(a) if he was voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation.— For the purpose of this sub-paragraph—

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall, —

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes member before the expiry of six months from the date on which he takes his seat after complying with the requirements of section 64.

(2) An elected member of a House who, has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of section 64.

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(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who on the commencement of the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987 is a member of a House (whether elected or nominated as such) shall, —

(i) where he was a member of a political party, immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

3. Disqualification on ground of defection not to apply in case of split.— Where a member of a House makes a claim that he and any other members of his Legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such Legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground—

(i) that he has voluntarily given up his membership of his original political party;

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

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4. Disqualification on ground of defection not to apply in case of merger.— (1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other member of his original political party,—

(a) have become members of such other political party or, as the case may be, of a new political party formed by such member; or

(b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the Legislature party concerned have agreed to such merger.

5. Exemption.— Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the Legislative Assembly or the Chairman or the Deputy Chairman of the Legislative Council shall not be disqualified under this Schedule—

(a) if he, by reason of his election to such office voluntarily gives up the membership of the political party to which he belongs immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or becomes a member of another political party;

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

6. Decision on questions as to disqualification on ground of defection.— (1) If any question arises as to whether a member of the House has become subject to disqualification under this Schedule, the

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question shall be referred for the decision of the Leader of the Legislature party to which such member belongs and his decision shall be final :

Provided that where the question which has arisen relates to a member belonging to a political party which has not elected any Leader of its Legislature party, the question shall be referred for the decision of the Speaker or, as the case may be, the Chairman and his decision shall be final:

Provided further that where the question which has arisen relates to a member not belonging to any political party, the question shall be referred for the decision of the Speaker or the Chairman, as the case may be, and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in the House within the meaning of section 89.

7. Bar of jurisdiction of Courts.— Notwithstanding anything in this Constitution no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

8. Rules.— (1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of the House may make rules for giving effect to the provisions of this Schedule and in particular, and without prejudice to the generality of the foregoing provisions, such rules may provide for,—

(a) the maintenance of registers or other records as to the political parties if any to which different members of the House belong;

(b) the report which the Leader of a Legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any members of the House and the officer of the house to whom such report shall be furnished; and

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(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

(2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect.

(3) The Chairman or the Speaker of the House may, without prejudice to the provisions of section 72 and to any other power which he may have under this Constitution direct that any wilful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House."

THE CONSTITUTION OF JAMMU AND KASHMIR (NINETEENTH AMENDMENT) ACT, 1987

[20th August, 1987]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Thirty-eighth Year of the Republic of India as follows:—

1. Short title and Commencement.— This Act may be called the Constitution of Jammu and Kashmir (Nineteenth Amendment) Act, 1987.

(2) It shall be deemed to have come into force on the first day of April, 1986.

2. Amendment of the Second Schedule to the Constitution of Jammu and Kashmir.— In the Second Schedule to the Constitution of Jammu and Kashmir (there in after referred to as the 'State Constitution'), in paragraph 1, for the letters and figures "Rs. 5,500" the letters and figures "Rs. 11,000" shall be substituted.

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3. Amendment of Fourth Schedule to the State Constitution.— In the Fourth Schedule to the State Constitution in paragraph 1, for the figures and word "4,000 rupees" and "3,500 rupees", the figures and word "9,000 rupees" and "8,000 rupees" shall respectively be substituted.

THE CONSTITUTION OF JAMMU AND KASHMIR (TWENTIETH AMENDMENT) ACT, 1987

[*2nd February, 1988*]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Thirty-eighth Year of the Republic of India as follows:—

1. Amendment of section 47 of the Constitution of Jammu and Kashmir.— (1) In section 47 of the Constitution of Jammu and Kashmir, in sub-section(1) for the words "One hundred" the words "One hundred and eleven" shall be substituted.

(2) The amendment made by sub-section (1) shall not affect the present composition of or representation in the existing Legislative Assembly until its dissolution.

THE CONSTITUTION OF JAMMU AND KASHMIR (TWENTY-FIRST AMENDMENT) ACT, 1989

[21st June, 1989]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Fortieth year of the Republic of India as follows :—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Twenty-first Amendment) Act, 1989.

2. Amendment of section 140 of the Constitution of Jammu and Kashmir.— In section 140 of the Constitution of Jammu and Kashmir for the words "twenty-one years" the words "eighteen years" shall be substituted.

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THE CONSTITUTION OF JAMMU AND KASHMIR (TWENTY-SECOND AMENDMENT) ACT, 1989

[10th November, 1989]

An Act further to amend the Constitution of Jammu and Kashmir.

Be it enacted by the Jammu and Kashmir State Legislature in the Fortieth Year of the Republic of India as follows:—

1. Short title.— This Act may be called the Constitution of Jammu and Kashmir (Twenty-second Amendment) Act, 1989.

2. Amendment of section 49 of the Constitution of Jammu and Kashmir.— In sub-section (2) of section 49 of the Constitution of Jammu and Kashmir for the words "thirty-three years" the words "forty-three years" shall be substituted.

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Appendix V

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954-C. O. 48 DATED 14-5-1954

List of Amendment Orders

S.No.	Year		Particulars
1.	1956		The Constitution (Application to Jammu and Kashmir) Amendment Order 1956 (C. O. 51 dated 11-2-1956).
2.	1958	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1958 (C.O. 55 dated 16-1-1958).
3.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1958 (C.O. 56 dated 26-2-1958).
4.	1959	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1959 (C.O. 57 dated 9-2-1959).
5.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1959 (C.O. 59 dated 23-4-1959).
6.	1960	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1960 (C.O. 60 dated 20-1-1960).
7.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1960 (C.O. 61 dated 22-6-1960).
8.	1961		The Constitution (Application to Jammu and Kashmir) Amendment Order, 1961 (C.O. 62 dated 2-5-1961).

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S.No.	Year		Particulars
9.	1963		The Constitution (Application to Jammu and Kashmir) Amendment Order, 1963 (C.O. 66 dated 25-9-1963).
10.	1964	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1964 (C.O. 69 dated 6-3-1964).
11.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1964 (C.O. 70 dated 2-10-1964).
12.		(iii)	The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1964 (C. O. 71 dated 21-12-1964).
13.	1965	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1965 (C.O. 72 dated 17-5-1965).
14.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965 (C.O. 74 dated 24-11-1965).
15.	1966		The Constitution (Application to Jammu and Kashmir) Amendment Order, 1966 (C.O. 75 dated 29-6-1966).
16.	1967	(i)	The Constitution (Application to Jammu and Kashmir) Amendment Order 1967 (C. O. 76 dated 13-2-1967).
17.		(ii)	The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1967 (C. O. 77 dated 5-5-1967).
18.		(iii)	The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1967 (C.O. 79 dated 11-8-1967).
19.		(iv)	The Constitution (Application to Jammu and Kashmir) Fourth Amendment Order, 1967 (C.O. 80 dated 26-12-1967).
20.	1968		The Constitution (Application to Jammu and Kashmir) Amendment Order, 1968 (C.O. 83 dated 9-2-1968).

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S.No.	Year	Particulars
21.	1969	(i) The Constitution (Application to Jammu and Kashmir) Amendment Order, 1969 (C.O. 85 dated 17-2-1969).
22.		(ii) The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1969 (C.O. 86 dated 31-3-1969).
23.	1971	(i) The Constitution (Application to Jammu and Kashmir) Amendment Order, 1971 (C.O. 89 dated 24-8-1971).
24.	1971	(ii) The Constitution (Application to Jammu and Kashmir) Amendment Order, 1971 (C.O. 91 dated 29-11-1971).
25.	1972	(i) The Constitution (Application to Jammu and Kashmir) Amendment Order, 1972 (C.O. 92 dated 24-2-1972).
26.		(ii) The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1972 (C.O. 93 dated 6-5-1972).
27.		(iii) The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1972 (C.O. 94 dated 2-8-1972).
28.		(iv) The Constitution (Application to Jammu and Kashmir) Fourth Amendment Order, 1972 (C.O. 95 dated 10-8-1972).
29.	1974	(i) The Constitution (Application to Jammu and Kashmir) First Amendment Order, 1974 (C.O. 97 dated 1-5-1974).
30.		(ii) The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974 (C.O. 98 dated 26-6-1974).
31.	1975	(i) The Constitution (Application to Jammu and Kashmir) Amendment Order, 1975 (C.O. 100 dated 29-6-1975).
32.		(ii) The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1975 (C.O. 101 dated 23-7-1975).

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S.No.	Year	Particulars
33.	1976	(i) The Constitution (Application to Jammu and Kashmir) First Amendment Order, 1976 (C.O. 103 dated 2-3-1976).
34.		(ii) The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1976 (C.O. 104 dated 25-5-1976).
35.		(iii) The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1976 (C.O. 105 dated 12-10-1976).
36.		(iv) The Constitution (Application to Jammu and Kashmir) Fourth Amendment Order, 1976 (C.O. 106 dated 31-12-1976).
37.	1977	The Constitution (Application to Jammu and Kashmir) Amendment Order, 1977 (C.O. 108 dated 31-12-1977).

Note 1.— The Constitution (Application to Jammu and Kashmir) Order, 1950 was the first Order made on 26th January, 1950 (C.O. 10 dated 26-1-1950). This Order was superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954 (C.O. 48 dated 14-5-1954).

Note 2. — In the footnotes C.O. means the Constitution (Application to Jammu and Kashmir) Amendment Order.

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954

In exercise of the powers conferred by caluse (1) of article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, is pleased to make the following Order:—

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1954.

(2) It shall come into force on the fourteenth day of May, 1954, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.

[1][The provisions of the Constitution as in force on the 20th day

1. The opening words have been successively amended by C.O. 76, C.O. 89, C.O. 91, C.O. 94, C.O. 98, C.O. 103, C.O. 104, C.O. 105, and C.O. 108 to read as above.

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of June, 1964 and as amended by the Constitution (Nineteenth Amendment) Act 1966, the Constitution (Twenty-first Amendment) Act, 1967, section 5 of the Constitution (Twenty-third Amendment) Act, 1969, the Constitution (Twenty-fourth Amendment) Act, 1971, section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, the Constitution (Twenty-sixth Amendment) Act, 1971, the Constitution (Thirtieth Amendment) Act, 1972, section 2 of the Constitution (Thirty-first Amendment) Act, 1973, section 2 of the Constitution (Thirty-third Amendment) Act, 1974, sections 2,5,6, and 7 of the Constitution (Thirty-eighth Amendment) Act, 1975, the Constitution (Thirty-ninth Amendment) Act, 1975, and the Constitution (Fourtieth Amendment) Act, 1976, which in addition to article 1 and article 370, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:—

(1) **THE PREAMBLE**

(2) **PART I**

To article 3, there shall be added the following further proviso, namely :—

> "Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State."

(3) **PART II**

(a) This Part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir as from the 26th day of January, 1950.

(b) To article 7, there shall be added the following further proviso, namely:—

> "Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir who, after having so migrated to the territory now included in Pakistan, returns to the territory of that State under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India."

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(4) **PART III**

(a) In article 13, references to the commencement of the Constitution, shall be construed as references to the commencement of this Order.

(b) In clause (4) of article 15, the reference to Scheduled Tribes shall be omitted.

(c) In clause (3) of article 16, the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir.

(d) In article 19, for a period of [1][twenty five years] from the commencement of this Order:—

(i) in clauses (3) and (4) after the words "in the interests of" the words "the security of the State or" shall be inserted;

(ii) in clause (5), for the words "or for the protection of the interests of any Scheduled Tribes", the words "or in the interests of the security of the State" shall be substituted; and

(iii) the following new clause shall be added, namely :—

'(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.'

(e) In clauses (4) and (7) of article 22, for the word "Parliament" the words "the Legislature of the State" shall be substituted.

(f) In article 31, clauses (3), (4) and (6) shall be omitted; and for clause (5), there shall be substituted the following clause, namely :—

"(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law; or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty; or

(ii) for the promotion of public health or the prevention of danger to life or property; or

---

1. Subs. for "twenty years" *vide* C.O. 97 of 1974. Previously "ten years" were subs. for "five years" *vide* C.O. 59 of 1959 "fifteen years" for "ten years" *vide* C.O. 69 of 1964 and "twenty years" for "fifteen years" *vide* C.O. 86 of 1969.

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(iii) with respect to property declared by law to the evacuee property."

(g) In article 31-A, the proviso to clause (1) shall be omitted; and for sub-clause (a) of clause (2), the following sub-clause shall be substituted, namely :—

'(a) "estate" shall mean land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes—

(i) sites of buildings and other structures on such land;

(ii) trees standing on such land;

(iii) forest land and wooded waste;

(iv) area covered by or fields floating over water;

(v) sites of *jandars* and *gharats*;

(vi) any *jagir*, *inam*, *muafi* or *mukarrari* or other similar grant, but does not include—

(i) the site of any building in any town, or town area or village *abadi* or any land appurtenant to any such building or site;

(ii) any land which is occupied as the site of a town or village; or

(iii) any land reserved for building purposes in a municipality or notified areas or cantonment or town area or any area for which a town planning scheme is sanctioned.'

[1][(h) In article 32, clause (3) shall be omitted;]

(i) In article 35—

(i) references to the commencement of the Constitution shall be construed as references to the commencement of this Order;

(ii) in clause (a) (i), the words, figures and brackets "clause (3) of article 16, clause (3) of article 32" shall be omitted; and

(iii) after clause (b), the following clause shall be added, namely:—

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1. Omitted by C. O. 89 of 1971.

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"(c) no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of [1][twenty years] from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof".

(j) After article 35, the following new article shall be added, namely :—

"35-A, Saving of laws with respect to permanent residents and their rights.— Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,—

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immoveable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

(5) **PART V**

[2][(a) For the purposes of article 55, the population of the State of Jammu and Kashmir shall be deemed to be sixty three Lakhs.]

[3][(b) In article 81, for clauses (2) and (3), the following clauses shall be substituted, namely:—

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1. See Footnote under clause (d) of sub-paragraph (4) relating to Part III.
2. Subs. C.O. 1998 of 1979.
3. Subs. by C.O. 98 of 1974.

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(2) For the purposes of sub-clause (a) of clause (1).—

(a) There shall be allotted to the State six Seats in the House of the People;

(b) The State shall be divided into single member territorial constituencies by the Delimitation Commission constituted under the Delimitation Act, 1972, in accordance with the such procedure as the Commission may deem fit;

(c) the constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience; and

(d) the constituencies into which the State is divided shall not comprise the area under the occupation of Pakistan.

(3) Nothing in clause (2) shall affect the representation of the State in the House of People until the dissolution of the House existing on the date of publication in the Gazette of India of the final order of orders of the Delimitation Commission relating to the delimitation of Parliamentary constituencies under the Delimitation Act, 1972.

(4) (a) The Delimitation Commission shall associate with itself for the purpose of assisting it in its duties in respect of State, five persons who shall be members of House of the People representing the State.

(b) The persons to be associated from the State shall be nominated by the Speaker of the House of the People having due regard to the composition of the House.

(c) The first nominations to be made under sub-clause (b) shall be made by the Speaker of the House of the People within two months from the commencement of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974.

(d) None of the Associate members shall have a right to vote to sign any decision of the Delimitation Commission.

(e) If owing to death or resignation, the office of an associate member falls vacant, it shall be filled as soon as may be practicable by the Speaker of the House of the People and in accordance with the provisions of sub-clauses (a) and (b).

[1][in article 133, after clause (1), the following clause shall be inserted, namely :—

1. Ins. by C.O. 98 of 1974.

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(1-A) The provisions of section 3 of the Constitution (Thirtieth Amendment) Act, 1972, shall apply in relation to the State of Jammu and Kashmir subject to the modification that references therein to "this Act" "the commencement of this Act" "This Act had not been passed" and "as amended by this Act" shall be construed respectively as references to "the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974", "The Commencement of the said order", "The said order had not been made" and "as it stands after the commencement of the said order";]

[1][(d)] In article 134, clause (2), after the words "Parliament may", the words "on the request of the Legislature of the State" shall be inserted.

[1][(e)] Articles 135, [2][x x x] and 139 shall be omitted.

[3][x x x]

[4][(5A)] **PART VI.**

[5][(a) Articles 153 to 217, article 219, article 221 and articles 223, 224, 224-A, 225 and articles 227 to 237 shall be omitted].

(b) In article 220, references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Amendment Order, 1960.

[6][(c)] In article 222, after clause (1) the following new clause shall be inserted, namely :—

"(1A) Every such transfer from the High Court of Jammu and Kashmir or to that High Court shall be made after consultation with the Governor."]]

(6) **PART XI**

[7][(a) In article 246, for the words, brackets and figures "clauses (2) and (3)" occurring in clause (1), the word, brackets and figure "clause (2)" shall be substituted, and the words, brackets and figures

1. Relettered by C.O. 98 of 1974.
2. The figure "136" omitted by C.O. 60 of 1960 (*w.e.f.* 26-1-1980).
3. Clauses (f) and (g) omitted by C.O. 56 of 1958.
4. Ins. by C.O. 60 of 1960 (*w.e.f.* 26-1-1960).
5. Subs. by C. O. 89 of 1971 for clause (9).
6. Subs. by C.O. 74 of 1965 for clause (c) (*w.e.f.* 24-11-1965).
7. Subs. by C.O. 66 of 1963 for clause (a).

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"Notwithstanding anything in clause (3)" occurring in clause (2) and the whole of clauses (3) and (4) shall be omitted.]

[1][(b) For article 248, the following article shall be substituted, namely:—

"248. Residuary powers of Legislation. — Parliament has exclusive power to make any law with respect to—

(a) Prevention of activities directed towards disclaiming, questioning of disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution ; and

(b) taxes on—

(i) foreign travel by sea or air;

(ii) inland air travel;

(iii) postal articles, including money orders phonograms and telegrams.]

(bb) Article 249 shall be omitted.

(c) In article 250, for the words "to any of the matters enumerated in the State List", the words "also to matters not enumerated in the Union List" shall be substituted.

(d) In article 251, for the words and figures "articles 249 and 250", the word and figures "article 250" shall be substituted, and the words "under this Constitution" shall be omitted; and, for the words "under either of the said articles", the words "under the said article" shall be substituted.

(e) To article 253, the following provision shall be added, namely:—

"Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State."

[2][x x x]

[2][(f)] Article 255 shall be omitted.

[2][(g)] Article 256 shall be re-numbered as clause (1) of that

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1. Subs. by C.O. 93 of 1972.
2. Clause (f) omitted and clauses (g), (h) and (i) relettered as clauses (f), (g) and (h) respectively by C.O. 66 of 1963.

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article, and the following new clause shall be added thereto, namely :—

"(2) The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

[1][x x x]

[2][(h)] In clause (2) of article 261, the words "made by Parliament" shall be omitted.

(7) **PART XII.**

[3][x x x x]

[4][(a)] Clause (2) of article 267, article 273, clause (2) of article 283, [5][and article 290] shall be omitted.

[4][(b)] In articles 266, 282, 284, 298, 299 and 300, references to the State or States shall be construed as not including references to the State of Jammu and Kashmir.

[4][(c)] In articles 277 and 295, references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(8) **PART XIII.**

[6][x x x x] In clause (1) of article 303, the words "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule" shall be omitted.

[6][x x x x]

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1. Clause (i) omitted by C.O. 56 of 1958.
2. Clause (j) relettered as clause (i) *vide*, *ibid* and again relettered as clauses (h) by C.O. 66 of 1963.
3. Clauses (a) and (b) ins. by C.O. 55 of 1958 have been omitted by C.O. 56 of 1958.
4. Clauses (a), (b) and (c) relettered as (c), (d) and (e) respectively by C.O. 55 of 1958 have again been relettered as (a), (b) and (c) respectively C.O. 56 of 1958.
5. Sub. by C.O. 93 of 1972.
6. Brackets and letter (a) and clause (b) omitted *vide*, *ibid*.

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(9) **PART XIV.**

[1][In article 312, after the words "the States" the brackets and words "(including the State of Jammu and Kashmir)" shall be inserted.]

[2][(10)] **PART XV.**

(a) In clause (1) of article 324, the reference to the Constitution shall, in relation to elections to either House of the Legislature of Jammu and Kashmir, be construed as a reference to the Constitution of Jammu and Kashmir.

[3][(b) In articles 325, 326, 327 and 329, the reference to a State shall be a construed as not including a reference to the State of Jammu and Kashmir.

(c) Article 328 shall be omitted.

(d) In article 329, the words and figures "or article 328" shall be omitted.]]

[4][(e) In article 329-A clauses (4) and (5) shall be omitted.

(11) **PART XVI.**

(a) In article 330, references to the "Scheduled Tribes" shall be omitted.

(b) Articles 331, 332, 333, 336, 337, 339 and 342 shall be omitted.

(c) In articles 334 and 335, references to the State or the States shall be construed as not including references to the State of Jammu and Kashmir.

(12) **PART XVII.**

The provisions of the Part shall apply only in so far as they relate to —

(i) the official language of the Union ;

(ii) the official language for communication between one State and another, or between a State and the Union; and

(iii) the language of the proceedings in the Supreme Court.

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1. Subs. for the previous modification by C.O. 56 of 1958.
2. Subs. by C.O. 60 of 1960 for sub-paragraph (10) (*w.e.f.* 26-1-1960).
3. Subs. by C.O. 75 of 1966 for Clauses (b) and (c).
4. Ins. by C.O. 105 of 1976.

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(13) **PART XVIII.**

(a) To article 352, the following new clause shall be added, namely :—

[1][(6) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects article 354) unless —

[2](a) It is made at the request or with the concurrence of the Government of that State, or

(b) Where it has not been so made, it is applied subsequently by the President to that State at the request or with the concurrence of the Government of that State."]

[3][(b) In clause (1) of article 356, references to provisions or provision of this Constitution shall, in relation to the State of Jammu and Kashmir, be construed as including references to provisions or provision of the Constitution of Jammu and Kashmir.

(c) Article 360 shall be omitted.]

(14) **PART XIX.**

[4][x x x x]

[5][(a)] [6][Article 365 shall be omitted.]

[7][x x x x]

[8][(b) To article 367, there shall be added the following clause, namely :-

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

---

1. Subs. by C.O. 91 of 1976.
2. Subs. by C.O. 100 of 1974.
3. Subs. for Clause (b) by C.O. 72 of 1964.
4. Clause (a) omitted by C.O. 74 of 1965.
5. Clauses (b) and (c) relettered as clauses (a) and (b) *vide, ibid.*
6. Subs. by C.O. 95 of 1972.
7. Original clause (c) omitted by C.O. 56 of 1958.
8. Subs. by C.O. 74 of 1965 for clause (b).

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[1][(aa) references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(b) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers:

Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Minister;]

(c) references to a High Court shall include references to the High Court of Jammu and Kashmir.

[2][x x x x]

[3][(d)] references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and

[4][(e) references to a Governor shall include references to the Governor of Jammu and Kashmir :

Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as references to the person recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person recognised by the President as being competent to exercise the powers of the Government.]

(15) **PART XX.**

[5][(a) To clause (2) of article 368, the following proviso shall be added, namely :—

---

1. Subs. by C.O. 74 of 1965 for clause (b).
2. Clause (d) omitted by C.O. 56 of 1958.
3. Clauses (e) and (f) relettered as clauses (d) and (e) respectively *vide ibid.*
4. Subs. by C.O. 74 of 1965 for clause (e).
5. Numbered as clause (a) by C.O. 101 of 1975.

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"Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370."]

[1][(b) After clause (3) of article 368, the following clause shall be added, namely :—

"(4) No law made by the Legislature of the State of Jammu and Kashmir seeking to make any change in or in the effect of any provision of the Constitution of Jammu and Kashmir relating to—

(a) appointment, powers, functions, duties, emoluments, allowances, privileges or immunities of the Governor; or

(b) Superintendence, direction and control of elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage and composition of the Legislative Council, being matters specified in sections 138, 139, 140 and 50 of the Constitution of Jammu and Kashmir, shall have any effect unless such law has, after having been reserved for the consideration of the President, received his assent".]

(16) **PART XXI.**

(a) Articles 369, 371, [2][371A], [3][372A], 373, clauses (1) (2), (3) and (5) of article 374 and [4][articles 376 to 378A and 392] shall be omitted.

(b) In article 372—

(i) clauses (2) and (3) shall be omitted;

(ii) references to the laws in force in the territory of India shall include references to *hidayats, ailans, ishtihars,* circulars, *robkars, irshads, yadashts,* State Council Resolutions, Resolutions of the Constituent Assembly and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and

(iii) references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

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1. Ins. *vide* Co. 101 of 1925.
2. Ins. by C.O. 74 of 1965.
3. Ins. by C.O. 56 of 1958.
4. Subs. for article 376 to 392 *vide, ibid.*

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(c) In clause (4) of article 374 the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board Constituted under the Jammu and Kashmir Constitution Act, 1996 and references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(17) **PART XXII.**

Articles 394 and 395 shall be omitted.

(18) **FIRST SCHEDULE.**

(19) **SECOND SCHEDULE**

[1][x x x x]

(20) **THIRD SCHEDULE.**

Forms V, VI, VII and VIII shall be omitted.

(21) **FOURTH SCHEDULE.**

[2][(22) **SEVENTH SCHEDULE]**

(a) In the Union List —

(i) for entry 3, the entry "3 Administration of cantonments" shall be substituted;

[3][(ii) entries 8, 9 [4][and 34] entry 79, and the words "Inter-State migration" in entry 81 shall be omitted;]

[5][x x x x]

[6][(iii)] in entry 72, the reference to the States shall be construed,—

(a) in relation to appeals to the Supreme Court from any decision or order of the High Court of the State of Jammu and Kashmir made in an election petition whereby an election to either House of the Legislature of that State has been called in question, as including a reference to the State of Jammu and Kashmir;

---

1. Modification relating to paragraph 6 omitted by C.O. 56 of 1958.
2. Subs. by C.O. 66 of 1963 for sub-paragraph (22).
3. Item (ii) subs. by C.O. 85 of 1969. It was previously subs. by C.O. 72 of 1965.
4. Subs. by C.O. 92 of 1972 & C.O. 95 of 1972.
5. Original item (iii) omitted by C.O. 74 of 1965.
6. Item (iv) renumbered as item (iii) by C.O. 74 of 1965 and subs. by C.O. No. 83 of 1968.

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(b) in relation to other matters as not including a reference to that State] [1][and]

[2][(iv) for entry 97, the following entry shall be substituted, namely:—

297. Prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution; taxes on foreign travel by sea or air, on inland air travel and on postal articles, including money orders, phonograms and telegrams."]

(b) The State List shall be omitted.

[3][(c) In the Concurrent List —

[4][(i) for entry 1, the following entry shall be substituted, namely:—

"1. Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respect to any of the matters specified in this list.]

[5][(ia) for entry 2, the entry "2. Criminal Procedure in so far as it relates to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country," shall be substituted;

(ib) for entry 12, the entry "12. Evidence and oaths in so far as they relate to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country," shall be substituted;

(ic) for entry 13, the entry "13. Civil Procedure in so far as it relates to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country." shall be substituted;]

[6][x x x x]

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1. Ins. by C.O. 85 of 1969.
2. Subs. by C.O. 93 of 1972.
3. Subs. by C.O. 69 of 1964 for clause (c).
4. Subs. by C.O. 70 of 1964 for item (i).
5. Subs. by C.O. 95 of 1972.
6. Items (ii) and (iii) omitted by C.O. 74 of 1965.

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[1][[2][(ii)] for entry 30, the entry "30. Vital statistics in so far as they relate to births and deaths including registration of births and deaths" shall be substituted.]

[3][x x x x]

[1][(iii) entry 3, entries 5 to 10 (both inclusive), entries 14, 15, 17, 20, 21, 27, 28, 29, 31, 32, 37, 38, 41 and 44 shall be omitted;

(iii-a) for entry 42, the entry "42. Acquisition and requisitioning of property, so far as regards Acquisition of any property covered by entry 67 of List 1 or entry 40 or List III or of any human work of art which has artistic value." shall be substituted;]

[4][(iv)] in entry 45, for the words and figures "List II or List III", the words "this List" shall be substituted.]

(23) **EIGHTH SCHEDULE**

[5][(24) **NINTH SCHEDULE.**

[6][(a)] After entry 64 the following entries shall be added, namely:—

[7](64A) The Jammu and Kashmir State Kuth Act (No. 1 of Svt. 1978)

[8](64B) The Jammu and Kashmir Tenancy Act (No. II of Svt. 1980)

[9](64C) The Jammu and Kashmir Alienation of Land Act (No. V of Svt. 1995)

[10](64F) The Jammu and Kashmir Restitution of Mortgaged Properties Act (No. XIV of 1976)

(64G) The Jammu and Kashmir Distressed Debtors Relief Act (No. XV of 1976)

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1. Ins. by C. O. 70 of 1964.
2. Item (iv) renumbered as item (ii) by C.O. 74 of 1965.
3. Item (v) and (vi) omitted by C. O. 72 of 1965.
4. Item (vii) renumbered as item (iv) by C.O. 74 of 1965.
5. Subs. by C.O. for sub-paragraph (24).
6. Reletter and ins. by C.O. 105.
7. Ins. by C.O. 108 (*w. e.f. 31-12-1977*).
8. Renumbered by C.O. 98 of 1974.
9. Relettered by C.O. 106 of 1976.
10. Ins. *ibid.*

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[1](64D) The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of Svt. 2007)

[1](64E) Order No. 6-H of 1951, dated 10th March, 1951, regarding Resumption of *Jagirs* and others assignments of land revenue, *etc.*]

[2][(b)] Entries 87 to 124 inserted by the Constitution (Thirty-nineth Amendment) Act, 1975 shall be renumbered as entries 65 to 102 respectively.

[3][(c)] Entries 125 to 188 shall be renumbered as entries 103 to 166 respectively.]

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1. Relettered by C. O. 106 of 1976.
2. Relettered and ins. by C. O. 105.
3. Ins. by C.O. 108 of 1977 (*w.e.f. 31-12-1977*).

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Appendix VI

STATE SUBJECT DEFINITION

Notification dated the 20th April, 1927

[1]No. I-L/84.- The following definition of the term "State Subject" has been sanctioned by His Highness the Maharaja Bahadur (*vide* Private Secretary's letter No. 2354, dated the 31st January, 1927 to the Revenue Member of Council) and is hereby promulgated for general information.

The term State Subject means and includes—

Class I.— All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Ghulab Singh Sahib Bahadur, and also persons who settled therein before the commencement of Samvat year 1942, and have since been permanently residing therein.

Class II.— All persons other than those belonging to Class I who settled within the State before the close of Samvat year 1968, and have since permanently resided and acquired immovable property therein.

Class III.— All persons other than those belonging to Classes I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or who may hereafter acquire such property under an ijazatnama and may execute a rayatnama after ten years continuous residence therein.

[2][*Class IV.*— Companies which have been registered as such within the State and which, being companies in which the Government

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1. This Notification is to be read subject to the provisions of section 6 of the Constitution of Jammu and Kashmir.
2. Class IV and Note IV added *vide* order No. 98-H/39, published in Government Gazette dated 27th Poh, 1996. By the same order His Highness is further pleased to direct that, notwithstanding any law, rule or other order to the contrary, no disability as regards acquisition of any interest in land or other immovable property in the State shall attach to a company which is a State Subject within the meaning of Notification No. I-L/84 dated 20th April, 1927, as amended.

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are financially interested or as to the economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State Subjects].

Note I.— In matters of grants of the State scholarships, State lands for agricultural and house building purposes and recruitment to State service, State Subjects of Class I should receive preference over other classes and those of Class II over Class III, subject, however, to the Order dated 31st January, 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State subjects in Government service.

Note II.— The descendants of the persons who have secured the status of any class of the State Subjects will be entitled to become the State Subject of the same class. For example, if A is declared a State Subject of Class II his sons and grandsons will *ipso facto* acquire the status of the same Class (II) and not of Class I.

[1][*Note III.*— The wife or a widow of a State Subject of any class shall acquire the status of her husband as State Subject of the same Class as her husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.]

[2][*Note IV.*— For the purposes of the interpretation of the term 'State Subject' either with reference to any law for the time being in force or otherwise, the definition given in this Notification as amended up to date shall be read as if such amended definition existed in this Notification as originally issued.]

NOTIFICATION

(Issued by order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June, 1932/14th Har, 1989. Published in Government Gazette dated 24th Har, 1989)

[3]*No. 13-L/1989.*— Whereas it is necessary to determine the status of Jammu and Kashmir State Subjects in foreign territories and to inform the Governments of Foreign States as to the position of their

1. Note III added vide Notification No. 51-L/1989 as amended by Notification No. 6-L/1990 published in Government Gazette dated 8th Baisakh, 1990 and Government Gazette dated the 23rd Bhadon, 1990 respectively.

2. See footnote under Class IV, p. 467.

3. This Notification is to be read subject to the provisions of section 6 of the Constitution of Jammu and Kashmir and the Jammu and Kashmir Grant of Permanent Resident Certificate (Procedure) Act, 1963 (XIII of 1963).

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nationals in this State; it is hereby commanded and notified for public information, as follows:—

1. That all emigrants from the Jammu and Kashmir State to foreign territories shall be considered State Subjects and also the descendants of these emigrants born abroad for two generations:

Provided that, these nationals of the Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by the laws, unless they fulfil the conditions laid down by those laws and rules for the specific purposes mentioned therein.

2. The foreign nationals residing in the State of Jammu and Kashmir shall not acquire the nationality of the Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an ijazatnama and on obtaining a rayatnama after ten years continuous residence in the Jammu and Kashmir State as laid down in Notification No. I-L of 1984, dated 20th April, 1927.

3. Certificates of nationality of the Jammu and Kashmir State may, on application, be granted by the Minister-in-Charge of the Political Department in accordance with the provisions of section 1 of this Notification.

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Appendix VII

Chronological List of Important Central Acts Applicable to the State of Jammu and Kashmir (Ending 1993)

S.No.	Name of the Act	Name of the Act by which made applicable
1.	2.	3.
1.	The Opium Act, 1857 (13 of 1857)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
2.	The Press and Registration of Books Act, 1867 (25 of 1867)	The Press and Registration of Books (Amendment) Act, 1965 (16 of 1965)
3.	The Government Savings Banks Act, 1873 (5 of 1873)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
4.	The Foreign Recruiting Act, 1874 (4 of 1874)	The Part-B States Laws Act, 1951 (3 of 1951)
5.	The Negotiable Instruments Act, 1881 (26 of 1881)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
6.	The Indian Explosive Act, 1884 (4 of 1885)	The Part-B States Laws Act, 1951 (3 of 1951)
7.	The Indian Telegraphs Act, 1885 (13 of 1885)	The Indian Telegraphs (Amendment) Act, 1948 (45 of 1948)
8.	The Police Act, 1888 (3 of 1888)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
9.	The Indian Reserve Forces Act, 1888 (4 of 1888)	The Adaptation of Laws Order (2) of 1956
10.	The Metal Tokens Act, 1989 (1 of 1989)	The Metal Tokens (Amendment) Act, 1962 (46 of 1962)

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11.	The Indian Railways Act, 1890 (9 of 1890)	The Indian Railways (Amendment) Act, 1948 (21 of 1948)
12.	The Indian Post Office Act, 1898 (6 of 1898)	The Finance Act, 1950 (25 of 1950)
13.	The Live Stock Importation Act, 1898 (9 of 1898)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
14.	The Indian Tolls (Army, Air Force) Act, 1901 (2 of 1901)	The Part-B States Laws Act, 1951 (3 of 1951)
15.	The Indian Works of Defence Act, 1903 (7 of 1903)	The Indian Works of Defence (Amendment) Act, 1965 (39 of 1965)
16.	The Indian Coinage Act, 1906 (3 of 1906)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
17.	The Explosive Substances Act, 1908 (6 of 1908)	The Part-B States Laws Act, 1951 (3 of 1951)
18.	The (XX) Designs Act, 1911 (2 of 1911) (The title of the original Act was the Patents and Designs Act, 1911. By section 162 of the Patents Act, 1970 (39 of 1970), the aforesaid Act was repealed in so far as it related to patents and also amended in the manner specified in the Schedule. The title of the original Act, was also changed to the Designs Act, 1911).	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)

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19.	The Official Trustees Act, 1913 (2 of 1913)	The Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968)
20.	The Destructive Insects and Pests Act, 1914 (2 1914)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
21.	The Poisons Act, 1919 (12 of 1919) (For limited purposes)	The Poisons (Amendment) Act, 1958 (47 of 1958)
22.	The Indian Red Cross Society Act, 1920 (15 of 1920)	The Indian Red Cross Society (Amendment) Act, 1956 (22 of 1956) (Originally this Act was made applicable to the State for limited purposes by Act 3 of 1951).
23.	The Passport (Entry into India) Act, 1920 (34 of 1920) (The short title has been substituted by Act 15 of 1967)	The Indian Passport (Amendment) Act, 1949 (36 of 1949)
24.	The Emigration Act, 1922 (7 of 1922)	The Indian Emigration (Amendment) Act, 1949 (3 of 1949)
25.	The Cantonment (House Accommodation) Act, 1923 (6 of 1923)	The Cantonment Laws (Extension & Amendment) Act, 1950 (53 of 1950)
26.	The Workmen's Compensation Act, 1923 (8 of 1923)	The Central Labour Laws (Extension to Jammu and Kashmir) Act, 1970 (51 of 1970)
27.	The Indian Cotton Cess Act, 1923 (14 of 1923) (For limited purposes only)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
28.	The Indian Official Secrets Act, 1923 (19 of 1923)	The Part-B States Laws Act, 1951 (3 of 1951)

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29.	The Cantonment Act, 1924 (2 of 1924)	The Cantonment Laws (Extension and Amendment Act, 1950 (53 of 1950)
30.	The Indian Soldiers (Litigation) Act, 1925 (4 of 1925)	The Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
31.	The Indian Carriage of Goods by Sea Act, 1925 (26 of 1925)	The Adaptation of Laws Order 1950
32.	The Government Trading Taxation Act, 1926 (3 of 1926)	The Taxation Laws (Extension to J & K) Act, 1954 (41 of 1954)
33.	The Trade Union Act, 1926 (16 of 1926)	The Central Labour Laws (Extension to J & K) Act, 1970 (3 of 1970)
34.	The Indian Light House Act, 1927 (17 of 1927)	The Indian Light House (Amendment Act, 1953 (18 of 1953)
35.	The Dangerous Drugs Act, 1930 (2 of 1930)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
36.	The Indian Lac Cess Act, 1930 (24 of 1930)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
37.	The Children Pledging of Labour Act, 1933 (2 of 1933)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
38.	The Indian Wireless Telegraphy Act, 1933 (17 of 1933)	The Wireless Telegraphy (Amendment) Act, 1949 (31 of 1949)
39.	The Reserve Bank of India Act, 1934, (19 of 1934)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
40.	The Indian Dock Labourers Act, 1934 (19 of 1934)	The Part-B States Laws Act, 1951 (3 of 1951)
41.	The Indian Aircraft Act, 1934 (22 of 1934)	The Adaptation of Laws Order, 1950
42.	The Petroleum Act, 1934 (30 of 1934)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)

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43.	The Indian Traffic Act, 1934 (4 of 1936)	The Taxation Laws (Extension to J & K) Act, 1954 (41 of 1954)
44.	The Payment of Wages Act, 1936 (4 of 1936)	Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
45.	The Agricultural Produce (Grading & Marking) Act, 1937 (1 of 1937)	The Agriculture Produce (Grading and Marking) Amendment Act, 1960 (25 of 1960)
46.	The Arbitration (Protocal & Convention) Act, 1937 (6 of 1937)	The Part-B States Laws Act, 1951 (3 of 1951)
47.	The Insurance Act, 1938 (4 of 1938)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
48.	The Manoeuvers, Field Firing and Artillery Practice Act, 1938	The Part B States Laws Act, 1951 (3 of 1951)
49.	The Criminal Law Amendment Act, 1938 (20 of 1938)	The Part-B States Laws Act, 1951 (3 of 1951)
50.	The Employers Liability Act, 1938 (24 of 1938)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
51.	The Employment of Children Act, 1938 (26 of 1938)	The Central Labour Laws (Extension to J & K Act, 1970 (51 of 1970)
52.	The Motor Vehicles Act, 1939 (4 of 1939)	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
53.	The Registration of Foreigners Act, 1939 (16 of 1939)	The Registration of Foreigners (Amendment) Act, 1949 (37 of 1949)
54.	The Currency Ordinance, 1940 (4 of 1940)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
55.	The Drugs and Cosmetics Act, 1940 (23 of 1940)	The Drugs and Cosmetics (Amendment) Act, 1972 (19 of 1972)

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56.	The Agricultural Produce Cess Act, 1940 (27 of 1940)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
57.	The Weekly Holidays Act, 1942 (18 of 1942)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
58.	The Armed Forces Special Powers Ordinance, 1942 (41 of 1942)	The Part-B States Laws Act, 1951 (3 of 1951)
59.	The Reciprocity Act, 1943 (9 of 1943)	The Part-B States Laws Act, 1951 (3 of 1951)
60.	The Central Excise and Sale Act, 1944 (1 of 1944)	The Taxation Laws (Extension to J & K) Act, 1954 (4 of 1954)
61.	The Indian Coconut Committee Act, 1944 (10 of 1944)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
62.	The Public Debt Act, 1944 (18 of 1944)	The Public Debt (Amendment) Act, 1972 (44 of 1972)
63.	The International Monetary Fund and Bank Act, 1945	The Part-B States Laws Act, 1951 (3 of 1951) read with the International Monetary Fund and Bank (Amendment) Act, 1959 (25 of 1959)
64.	The Indian Oil Seeds Committee Act, 1946 (9 of 1946)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
65.	The Industrial Employment (Standing Orders) Act, 1946 (20 of 1946)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
66.	The Delhi Special Police Establishment Act, 1946 (25 of 1946)	The Jammu & Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
67.	The Foreigners Act, 1946 (31 of 1946)	The Foreigners (Amendment) Act, 1947 (38 of 1947)
68.	The Industrial Disputes Act, 1947 (14 of 1947)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)

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69.	The Armed Force (Emergency Duties) Act, 1947 (15 of 1947)	The Armed Forces (Emergency Duties (Amendment) Act, 1948 (4 of 1948)
70.	The Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947 (16 of 1947)	The Part-B States Laws Act, 1951 (3 of 1951)
71.	The Imports and Exports (Control) Act, 1947 (18 of 1947)	The Imports and Exports (Control Amendment) Act, 1955 (2 of 1955)
72.	The Coal Mines Labour Welfare Fund Act, 1947 (32 of 1947)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
73.	The United Nations (Security Council) Act, 1947 (43 of 1947)	
74.	The United Nations (Privileges and Immunities)Act, 1947 (46 of 1947)	
75.	The Minimum Wages Act, 1948 (11 of 1948)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
76.	The Industrial Finance Corporation Act, 1948 (15 of 1948)	The Industrial and State Financial Corporations (Amendment) Act, 1955 (28 of 1955)
77.	The Dentists Act, 1948 (61 of 1948)	The Dentists (Amendment) Act, 1972 (42 of 1972)
78.	The National Cadet Corps Act, 1948 (31 of 1948)	
79.	The Employee's State Insurance Act, 1948 (34 of 1948)	The Central Labour (Extension to Jammu & Kashmir) Act, 1970 (51 of 1970)
80.	The Census Act, 1948 (37 of 1948)	The Census (Amendment) Act, 1959 (22 of 1959)

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81.	The Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (41 of 1948)	The Diplomatic and Consular Officers (Oaths and Fees) Extension to J & K Act, 1973 (2 of 1973)
82.	The Coal Mines Family Pension, Provident Fund and Bonus Schemes Act, 1948 (46 of 1948)	The Central Labour Laws (Extension to J & K) Act, 1970 (51 of 1970)
83.	The Oil Fields (Regulation and Development) Act, 1948 (53 of 1948)	The Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957)
84.	The Territorial Army Act, 1948 (56 of 1948)	
85.	The Exchange of Prisoners Act, 1948 (58 of 1948)	
86.	The Central Silk Board Act, 1948 (61 of 1948)	The Central Silk Board (Amendment) Act, 1970 (21 of 1970)
87.	The Factories Act, 1948 (65 of 1948)	The Central Labour Laws (Extension to Jammu & Kashmir) Act, 1970 (51 of 1970)
88.	The Banking Companies Act, 1949 (10 of 1949)	The J & K (Extension of Laws Act, 1956 (62 of 1956)
89.	The Payment of Taxes (Transfer of Property) Act, 1949 (22 of 1949)	The Taxation Laws (Extension to Jammu & Kashmir) Act, 1954 (41 of 1954)
90.	The Chartered Accountants Act, 1949 (38 of 1949)	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
91.	The Banking Companies (Legal Practitioners Clients Accounts) Act, 1949 (46 of 1949)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
92.	The Central Reserve Police Force Act, 1949 (66 of 1949)	

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93.	The Emblems and Names (Provision of Improper Use) Act, 1950 (12 of 1950)	The Jammu & Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
94.	The Transfer of Prisoners Act, 1950 (29 of 1950)	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
95.	The Army and Air Force (Disposal of Private Property) Act, 1950 (40 of 1950)	
96.	The Representation of the People Act, 1950 (43 of 1950) (For limited purposes only).	
97.	The Air Force Act, 1950 (45 of 1950)	
98.	The Army Act, 1950 (46 of 1950)	
99.	The Contingency Fund of India Act, 1950 (49 of 1950)	
100.	The Road Transport Corporation Act, 1950 (64 of 1950).	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
101.	The Telegraph Wires (Unlawful Possession) Act, 1950 (74 of 1950)	
102.	The Finance Commission (Miscellaneous Provisions) Act, 1951 (33 of 1951)	
103.	The Marking of Heavy Packages Act, 1951 (39 of 1951)	

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104.	The Representation of the People Act, 1951 (43 of 1951) (For limited purposes only).	
105.	The Tariff Commission Act, 1951 (50 1951) (For limited purposes only).	
106.	The All India Services Act, 1951 (61 of 1951).	The All India Services (Amendment) Act, 1958 (25 of 1958)
107.	The State Financial Corporation Act, 1951 (63 of 1951)	The Jammu & Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
108.	The Industries (Development and Regulation) Act, 1951 (65 of 1951)	The Industries Development and Regulation (Amendment) Act, 1961 (51 of 1961)
109.	The Inflammable Substance Act, 1952 (20 of 1952)	
110.	The Presidential and Vice-Presidential Election Act, 1952 (31 of 1952)	
111.	The Mines Act, 1952 (35 of 1952)	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
112.	The Indian Standards Institution (Certificate Marks) Act, 1952 (36 of 1952)	The Indian Standards Institution (Certificate Marks) Amendment Act, 1961 (44 of 1961)
113.	The Cinematograph Act, 1952 (37 of 1952) (For limited purpose only)	The Cinematograph (Amendment) Act, 1973 (25 of 1973)
114.	The Notarics Act, 1952 (53 of 1952)	The Central Laws (Extension to Jammu and Kashmir Act, 1968 (25 of 1968)

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115.	The Commissions of Inquiry Act, 1952 (60 of 1952)	The Commissions of Inquiry (Amendment) Act, 1971 (79 of 1971)
116.	The Reserve and Auxiliary Air Force Act, 1952 (62 of 1952)	
117.	The Forward Contracts (Regulation) Act, 1952 (74 of 1952)	The Forward Contracts (Regulation) Amendment Act,1960 (62 of 1960)
118.	The State Armed Police Force (Extension of Laws) Act, 1952 (63 of 1952)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
119.	The Khadi and Other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953 (12 of 1953)	The J & K (Extension of Laws) Act, 1956 (62 of 1956)
120.	The Air Corporations Act, 1953 (27 of 1953)	
121.	The Tea Act, 1953 (29 of 1953) (For limited purposes only)	
122.	The Estate Duty Act, 1953 (34 of 1953)	The Taxation Laws (Extension to Jammu & Kashmir) Act, 1954 (41 of 1954)
123.	The Dhotis (Additional Excise Duty) Act, 1953 (39 of 1953)	The Dhotis (Additional Excise Duty) (Amendment) Act, 1957 (31, 1957)
124.	The Salt Cess Act, 1953 (49 of 1953)	The Jammu & Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
125.	The High Court Judges (Conditions of Service) Act, 1954 (28 of 1954)	
126.	The Salaries and Allowances of Members of Parliament Act, 1954 (30 of 1954)	

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127.	The Prevention of Food Adulteration Act, 1954 (37 of 1954)	The Reservation of Food Adulteration (Amendment) Act,1971 (41 of 1971)
128.	The Essential Commodities Act, 1955 (10 of 1955)	The Central Laws (Extension to J & K) Act, 1968 (25 of 1968)
129.	The Medical and Toilet Preparations (Excise Duties) Act, 1955 (16 1955)	
130.	The Untouchability Offenses Act, 1955 (22 of 1955)	
131.	The State Bank of India Act, 1955 (23 of 1955)	
132.	The Spirituous Preparations (Interstate Trade and Commerce) Control Act, 1955 (39 of 1955)	
133.	The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955)	The Central Labour Laws (Extension to Jammu & Kashmir Act, 1970 (51 of 1970)
134.	The Citizenship Act, 1955 (57 of 1955).	
135.	The Companies Act, 1956 (1 of 1956)	The Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968). (Originally this Act was made applicable to the State for limited purposes by Act, 62 of 1956)
136.	The University Grants Commission Act, 1956 (3 of 1956)	
137.	The Life Insurance (Emergency Provisions) Act, 1956 (9 of 1956)	

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138.	The Life Insurance Corporation Act, 1956 (31 of 1956)	
139.	The Inter-State Water Disputes Act, 1956 (33 of 1956)	
140.	The Securities Contracts (Regulation) Act, 1956 (42 of 1956)	
141.	The National Highways Act, 1956 (48 of 1956)	
142.	The River Boards Act, 1956 (49 of 1956)	
143.	The Lok Sahayak Sena Act, 1956 (53 of 1956)	
144.	The Terminal Tax on Railway Passengers Act, 1956 (69 of 1956)	
145.	The Central Sales Tax Act, 1956 (74 of 1956)	The Central Sales Tax (Amendment) Act, 1958 (5 of 1958)
146.	The Standards of Weights and Measures Act, 1956 (89 of 1956)	
147.	The Indian Medical Council Act, 1956 (102 of 1956) ⟶	The Indian Medical Council (Amendment) Act, 1960 (41 of 1960)
148.	The Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956).	The Indian Medical Council (Amendment) Act, 1964 (24 of 1964)
149.	The Copyright Act, 1957 (14 of 1957)	(This Act repeals the Copy Right Act, 1914 which was made applicable to the State of Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)
150.	The Railways Protection Forces Act, 1957 (23 of 1957)	

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151.	The Wealth Tax Act, 1957 (27 of 1957)	
152.	The Cotton Fabrics (Additional Excise Duty) Act, 1957 (33 of 1957).	
153.	The Inter State Corporations Act, 1957 (38 of 1957)	
154.	The Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957)	
155.	The Navy Act, 1957 (62 of 1957)	
156.	The Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957)	
157.	The Rice Milling Industry (Regulation) Act, 1958 (21 of 1958)	The Rice Milling Industry Regulation (Amendment) Act, 1972 (41 of 1972)
158.	The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958)	The Antiquities and Art Treasures Act, 1972 (52 of 1972) (The Act originally applied for limited purposes)
159.	The Mineral Products (Additional Duties on Excise and Customs) Act, 1958 (27 of 1958) (The word 'Oils' was substituted by the word 'Products' by Act 41 of 1964)	
160.	The Sugar Export Promotion Act, 1958 (30 of 1958)	

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161.	The International Financial Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958)	
162.	(The Trade and Merchandise Marks Act, 1958 (43 of 1958) This Act replaces:- i) The Merchandise Marks Act, 1889, and ii) The Trade Marks Act, 1940 which were made applicable to the State by Act, 62 of 1956)	
163.	The Parliament (Prevention of Disqualification) Act, 1959 (10 of 1959)	
164.	The Cost and Works Accountants Act, 1959 (23 of 1959)	The Central Laws (Extension to Jammu and Kashmir Act, 1968 (25 of 1968)
165.	The Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 (31 of 1959)	The Central Labour Laws (Extension to Jammu & Kashmir) Act, 1970 (51 of 1970)
166.	The Oil and Natural Gas Commission Act, 1959 (43 of 1959)	The Oil and Natural Gas Commission (Amendment) Act, 1962 (38 of 1962)
167.	The Government Savings .Certificate Act, 1959 (46 of 1959)	
168.	The Haj Committee Act, 1959 (51 of 1959)	
169.	The Arms Act, 1959 (54 of 1959)	

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	(This Act replaces the Indian Arms Act, 1878 which was made applicable to the State by Act, 3 of 1951).	
170.	The Indian Statistical Institute Act, 1959 (57 of 1959)	
171.	The Sugar (Special Excise Duty) Act, 1959 (59 of 1959)	
172.	The Geneva Conventions Act, 1960 (6 of 1960)	
173.	The International Development Association (Status Immunities and Privileges) Act, 1960 (32 of 1960)	
174.	The Preference Shares (Regulation of Dividends) Act, 1960 (63 of 1960) (For limited purposes only).	
175.	The Advocates Act, 1961 (25 of 1961)	The Advocates (Amendment) Act, 1973 (60 of 1973)
176.	The Motor Transport Workers Act, 1961 (27 of 1961)	The Central Labour Laws (Extension to Jammu & Kashmir) Act, 1971 (51 of 1971)
177.	The Income Tax Act, 1961 (43 of 1961). (This Act replaces the Act of 1922 which was made applicable to the State by Act, 41 of 1954)	

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178. The Payment of Gratuity Act, 1972 (39 of 1972)

(For limited purposes only.)

179. The Diplomatic Relations (Vienna Convention) Act, 1972 (43 of 1972)

180. The Rulers of Indian States (Abolition of Privileges) Act, 1972 (54 of 1972)

181. The General Insurance Business (Notification) Act, 1972 (57 of 1972)

182. The Former Secretary of State Service Officers (Conditions of Service) Act, 1972 (59 of 1972)

183. The Limestone and Dolomite Mines Labour Welfare Act, 1972 (62 of 1972)

184. The Carriage by Air Act, 1972 (69 of 1972)

(This Act has replaced the Indian Carriage By Air Act, 1934 (20 of 1934) which had been extended to the State by the Part-B States Laws Act, 1951 (3 of 1951)

185. The Sick Textile Undertakings (Taking over of Management) Act, 1972 (72 of 1972)

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186. The Delimitation Act, 1972 (76 of 1972)

(For limited purposes only)

187. The Foreign Exchange Regulation Act, 1973 (46 of 1973)

(This Act replaces the Foreign Exchanges Regulation Act, 1947 (7 of 1947) which had been extended to the State by the Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956)

188. The Authorised Translations (Central Laws) Act, 1973 (50 of 1973)

189. The Homoeopathy Central Council Act, (1973 (59 of 1973)

190. Additional Endowments (Compulsory Deposit) Act, 1974.

191. Interstate Migrant Workman Regulation of Employment and Condition of Service Act, 1979 (30 of 1979).

192. Hotel Receipt Tax Act, 1980.

193. Union Duties of Excise (Electricity) Distribution Act, 1980.

194. Air (Prevention and Control of Pollution) Act, 1981.

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195. Civil Workers and Cinema Theatres Workers (Regulation of Employment) Act, 1981.

196. Company Secretaries Act, 1981.

197. Essential Service Maintenance Act, 1981 (41 of 1981).

198. Export-Import Bank of India Act, 1981 (28 of 1981) Enforced by S O 919(E) dated 29-12-1981 w.e.f. 1-1-1982.

199. Special Bearer Bonds Immunities and Exemptions Act, 1981.

200. National Bank for Agriculture and Rural Development Act, 1981.

201. Sugar Cess Act, 1982.

202. Sugar Development Act, 1982.

203. Terrorist and Disruptive Activities (Prevention) Act, 1983:

204. Dangerous Machine Regulation Act, 1983 (35 of 1983).

205. Narcotic Drugs and Psychotropic Substance Act, 1985.

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Schedule

The matters with respect to which the Dominion Legislature may make laws for this State

A. Defence

1. The naval, military and air forces of the Dominion and any other armed force raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
2. Naval, military and air force works, administration of cantonment areas.
3. Arms, fire-arms; ammunition.
4. Explosives.

B. External Affairs

1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.
2. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements of India of persons who are not British

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subjects domiciled in India or subjects of any acceding State, pilgrimages to places beyond India.

C. Communications

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.
2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fare, station and services terminal charges, interchange of traffic and the responsibility of railway administration as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administration of such railways as carriers of goods and passengers.
3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.
4. Port quarantine.
5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port authorities therein.
6. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.
7. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.
8. Carriage of passengers and goods by sea or by air.
9. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

D. Ancillary

1. Elections to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.
2. Offences against the laws with respect to any of the aforesaid matters.

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3. Inquiries and statistics for the purposes of any of the aforesaid matters.
4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction or powers upon any courts other than ordinarily exercising jurisdiction in or in relation to that State.

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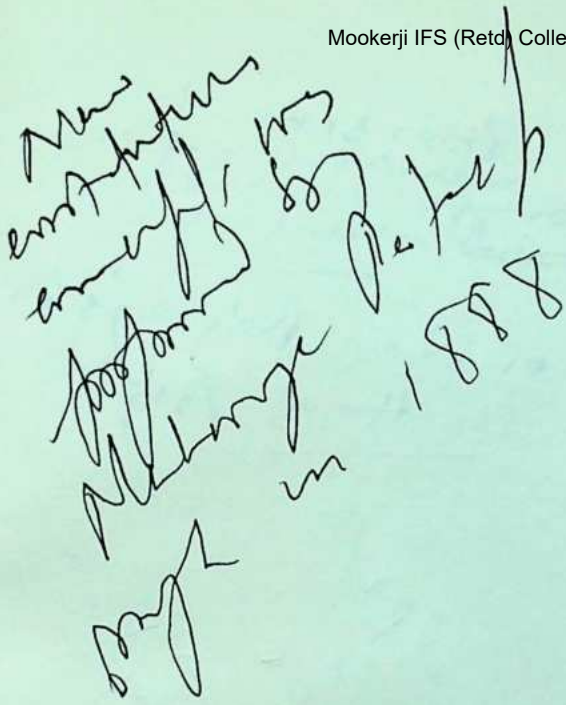

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ABOUT THE AUTHOR

Justice A.S. Anand

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Born on 1st November, 1936 at Jammu and Kashmir State, the author received his early education in Jammu and Kashmir. He obtained his LL.B. Degree from Lucknow University with First Division in 1960 and proceeded to the United Kingdom for higher studies. He joined the University College, London and was awarded the Degree of Doctor of Philosophy in Law in the Field of Constitutional Laws of the Commonwealth in 1963 by the London University, for his thesis "Development of the Constitution of Jammu and Kashmir". The author was called to the Bar from Inner Temple, London in 1964. During his career as student at the London University, he addressed various legal seminars and his address on "The legality of Kashmir's accession to India" at the Institute of Advanced Legal Studies, London, was highly appreciated. Later on, the paper was published by the Indian Law Institute, New Delhi, in its Law Journal.

The author on return to India in 1964, started his practice of law at the Bar of High Court of Punjab and Haryana at Chandigarh. He also served as a part time Law Lecturer in the Faculty of Laws, Punjab University, Chandigarh for more than a decade. He was elevated as an Additional Judge of the High Court of Jammu and Kashmir in May, 1975 at the young age of thirty-eight & half years. He was appointed a permanent Judge of that Court in February, 1976 and thereafter was appointed the Chief Justice of the High Court of Jammu and Kashmir in 1985. Later he was transferred as Chief Justice of Judicature of Madras with effect from 1st November, 1989 and was elevated to the Bench of the Supreme Court of India in November, 1991. The author has headed various Commissions of Enquiry, notable among those being the Commission set up by the Government of Jammu and Kashmir for Rationalising the Recruitment Rules relating to Backward Classes and for Backward Areas in the State; Commission of Enquiry appointed to enquire into the "Poonch Firing" and the Commission of Enquiry set up to enquire into the causes of fire in the Legislative Complex, Srinagar and to suggest means for the improvement of the "Fire Fighting Service" in the State of Jammu and Kashimr. The author was a member of the High Court Arrears Committee, appointed by the Government of India, on the recommendation of the Chief Justices' Conference, headed by Hon'ble Mr. V.S. Malimath, the then Chief Justice of Kerala High Court. The author has been a member of Jammu University Council and the Faculty of Law, Jammu University. He has also served as a member of the Board of Studies, Faculty of Laws, Kashmir University and was a member of the Governing body of Islamia College, Srinagar.

The author is widely travelled and has participated in various National and International Law Conferences like the Appellate Judges Conference at Manila (Phillipines) in 1[illegible], the [illegible] Conference in 1984 and 1986, and SAARCLAW [illegible] 1994 at New Delhi.

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some opinions

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